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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73-542

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
A. H. BELO CORP. (WFAA-TV), DALLAS, TEX.	Docket No. 19744
For Renewal of Broadcast License	File No. BRCT-33
WADECO, INC., DALLAS, TEX.	Docket No. 19745
For Construction Permit for New Television Broadcast Station	File No. BPCT-4453

ORDER

(Adopted May 23, 1973; Released May 24, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS ABSENT

1. The Commission has before it for consideration the above-captioned applications, one requesting a renewal of license to operate on channel 8, Dallas, Texas, and the other requesting a construction permit for a new television broadcast station to operate on channel 8, Dallas, Texas.

2. Based on the information contained in the application of WADECO, Inc., cash in the amount of $2,799,000 will be needed for the construction and first three months cost of operation of the proposed station, consisting of down payment on equipment—$625,000; two months principal and interest payments on equipment—$93,750; other items—$417,000; three months cost of operation—$1,618,250;[1] and grant fee—$45,000. To meet its cash needed requirement, the applicant relies upon paid-in stock subscriptions, stock subscription agreements and a $2,500,000 bank loan from the Castle Trust Company Limited. In an amendment filed November 2, 1972, the applicant indicated in section II, paragraph 11, FCC Form 301, that 118,940 shares have been subscribed and 78,060 shares had been issued, for a total of 197,000 shares. The information contained in the application demonstrates that the stock subscribers can meet their respective stock subscription commitments to the applicant. However, on May 8, 1973, the applicant submitted a balance sheet dated February 28, 1973, which conflicts with the information contained in section II, paragraph 11 in that different amounts of stock issued and subscribed are specified.

[1] As in similar cases in the past, we will not apply the standard set forth in *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965). Rather we will apply our former standard which required an applicant to demonstrate that it has sufficient funds to construct and operate the proposed station for three months without revenues. *Orange Nine, Inc.*, 7 FCC 2d 788 (1967). In this connection, it is noted that the Commission's TV Broadcast Financial Data Report for 1972 reveals that the Dallas-Fort Worth television broadcast stations generated revenues on an average in excess of the applicant's anticipated first year operating costs ($6,473,000).

Moreover, the balance sheet appears to be internally inconsistent since on the asset side, stock subscriptions receivable of 116,055 are listed whereas, on the liabilities side, capital stock subscribed, but not issued, is shown as 116,250. With respect to the stock subscriptions already paid in, the applicant's balance sheet shows $2,783.51 in cash and $78,541.47 in pre-paid expenses. Since the pre-paid expenses have not been itemized in order to show that they relate to the total construction costs set forth in section III, paragraph 1(a), it cannot be determined whether the applicant can receive credit for these pre-paid expenses.

3. With respect to the proposed $2,500,000 bank loan, since the Castle Trust Company Limited has stated that it is "willing to arrange for a loan", this does not constitute a commitment by the bank to provide the funds.[2] In the event that the applicant is able to satisfactorily demonstrate the availability of all of the funds upon which it relies, the applicant will still need additional funds in order to be considered financially qualified. Consequently, appropriate financial issues have been specified.

4. Except as indicated by the issues set forth below, WADECO, Inc., is qualified to construct, own and operate the proposed new television broadcast station. Except for the matters discussed in paragraph 5 below, A. H. Belo Corporation is qualified to own and operate television broadcast station WFAA-TV. The applications are, however, mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference. The Commission is, therefore, unable to make the statutory finding that a grant of the applications would serve the public interest, convenience and necessity, and is of the opinion that they must be designated for hearing in a consolidated proceeding on the issues set forth below.

5. It should be noted that on September 9, 1970, UHF, Inc., instituted a civil suit in the United States District Court for the Northern District of Texas, Dallas Division (Civil Action No. 3-4156-A), charging, among others, the A. H. Belo Corporation, the licensee of WFAA-TV, and The Times Herald Printing Company, the licensee of station KDFW-TV, Dallas, Texas, with violations of the Sherman Anti-trust Act by entering into a contract, combination or conspiracy in restraint of trade, by attempting to and monopolizing the television broadcast industry in the Dallas-Fort Worth metropolitan area, and by seeking to and precluding the plaintiff from competing in such market. The complainant further charges that in furtherance of the alleged restraint of trade the above defendants have (1) opposed the granting of cable television (CATV) rights to their parties, attempted to delay CATV development in the Dallas metropolitan area and, at the same time, sought to maintain the exclusive right to provide CATV services at a date of their choosing, if ever; and (2) discriminated against UHF television broadcast station KMEC, Dallas, Texas, by failing to provide in their respective newspapers of general circulation program listings equivalent to those accorded VHF television broadcast stations in the Dallas-Fort Worth metropolitan area. On July 1, 1971, the principals of UHF, Inc., acting through Civic Telecasting Corporation

[2] In this connection, it should be noted that the proposed bank loan adequately sets forth the terms of principal repayment, the security required and the rate of interest to be charged.

formally petitioned to deny the license renewal applications of A. H. Belo Corporation (BR-395), BRH-1192, BRCT-33), Beaumont Television Corporation (BRCT-556), The Times Herald Printing Company (BRCT-85), and Carter Publications, Inc. (BR-404, BRH-539, BRCT-27), essentially on the same grounds raised in their civil antitrust complaint (CA-3-4156-A). Action on the aforenoted license renewal applications has been deferred pending the Commission's consideration of the allegations set forth in the petition to deny. See FCC 73-543 adopted this date. Depending upon our disposition of the petition to deny, however, further orders in this proceeding may be appropriate.[3]

6. A dispute also arose in this case concerning possible changes in the integration of ownership and management picture of station WFAA-TV. This dispute has caused us to focus on the relationship between past record and integration of ownership and management in the evaluation of the renewal applicant. See Letter to Mr. Thomas M. P. Christensen, FCC 73-545. As we made clear, WFAA-TV as a renewal applicant is judged solely on its past record—not its integration. Whether that record warrants a "plus of major significance" (*Citizens Communications Center* v. *FCC*, 145 U.S. App. D.C. 32, 447 F 2d 1201, decided June 11, 1971) is of crucial importance in the judgmental process. As the Court there noted, the incumbent licensee with such a "plus" can normally expect renewal in any comparative challenge. In short, in the case of the renewal applicant there is no need to rely upon presumptions (e.g., integration, local residence) as to how the applicant will perform in this critical area of serving the needs and interests of his area—that whether his integration is zero or 100%, the actual past performance speaks for itself and is the factor to be considered in the evaluation of the renewal applicant in this respect.

7. Accordingly, IT IS ORDERED, that pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the application of WADECO, Inc.:

(a) The number of shares of the applicant corporation which have been issued and the number of shares which have been subscribed.

(b) The extent to which the applicant's pre-paid expenses are attributable to construction costs set forth in section III, paragraph 1(a), FCC Form 301.

(c) Whether the applicant will have available a $2,500,000 bank loan from the Castle Trust Company Limited, Nassau, Bahamas.

(d) Assuming that all of the funds upon which the applicant relies will be available to it, how the applicant will obtain sufficient additional funds to be used for the construction and first three months operation of the station.

(e) Whether, in view of the evidence adduced under the preceding issues, the applicant is financially qualified.

2. To determine which of the proposals would better serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That, in the event of a grant of the renewal application of A. H. Belo Corporation, its application will be subject to the following condition:

[3] Moreover, when action is taken on the petition to deny, we will also consider the allegations raised by Mr. James T. Maxwell, President of Civic Telecasting Corporation that A. H. Belo Corporation has engaged in prohibited *ex parte* presentations.

That the grant of this application is without prejudice to whatever action, if any, the Commission may deem appropriate as a result of final action in the civil antitrust proceeding entitled *UHF, Inc. v. The Times Herald Printing Company, T. H. Liquidating Company and The A. H. Belo Corporation*, Civil Action No. 3–4156–A, filed September 9, 1970, in the United States District Court for the Northern District of Texas, Dallas Division.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That, the applicants herein shall pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing within the time and the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

OPINION OF COMMISSIONER NICHOLAS JOHNSON, CONCURRING IN PART AND DISSENTING IN PART

While I concur with that portion of the majority's opinion which designates a comparative hearing on the mutually exclusive application of A. H. Belo Corporation and WADECO, Inc., to operate on channel 8, Dallas, Texas, I cannot agree with the majority that the accompanying assignments and transfers of control serve the public interest.

Rather, I tend to agree with WADECO that these intricate assignments appear designed as a means to improve the comparative position of the current WFAA–TV licensee. I can perceive no other cogent purpose for these assignments, and despite the majority's language suggesting that the position of WFAA's licensee will not be so improved, I must admit that I have my doubts. For, sadly, such assurances are often mere words—words whose intent is easily lost through the months of hearings which follow FCC designation orders.

In short, while I am not at all persuaded that these assignment transactions serve the "public interest, convenience or necessity," I am also fearful that their real intent will return to haunt not only WADECO and not only those parties who have filed petitions to deny against WFAA's license renewal applications, but also this Commission.

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

I concur in the Order which designates for hearing in a consolidated proceeding the renewal application of A. H. Belo Corporation for Station WFAA–TV (Channel 8, Dallas, Texas) and the mutually exclusive application of WADECO, Inc. for the Channel 8 facilities. I also concur in the further Order which conditions grant of Belo's renewal application on whatever action the Commission may deem appropriate as a result of the Court's decision in a civil antitrust

suit brought against Belo and other parties, charging the defendants with monopolizing the television industry in the Dallas-Fort Worth area.[1]

However, I am concerned by the inclusion of certain language in the designation Order, which attempts to clarify an aspect of Commission policy applicable to a renewal-new applicant comparative proceeding. In paragraph six of the Order, the Commission indicates that WFAA–TV, as a renewal applicant, is to be judged solely on its past broadcast record (citing *Citizens Communications Center* v. *F.C.C.*, 145 U.S. App. D.C. 32, 447 F. 2d 1201 (1971)) and not on any "presumption" as to the licensee's integration of ownership and management. While I may concur with the general statement of policy that a licensee's actual past performance is of crucial importance in a comparative proceeding and with the need to clarify the scope of the comparative issue in a renewal-new applicant proceeding, I cannot agree that an isolated designation Order is the proper vehicle for the delineation of major policy by the Commission. The general inquiry raised in Docket No. 19154[2] is whether we can formulate some definitive guidelines for application in a comparative proceeding involving a regular renewal applicant and one or more competing applicants for the same facilities. The Commission has already received numerous comments in Docket No. 19154 and has held oral argument in the proceeding to determine what factors will be used to evaluate a renewal applicant (e.g., past performance, integration of ownership and management, diversification), and it seems obvious that any major policy pronouncements in this important area of broadcast regulation should be contained in a Report and Order in Docket No. 19154.

Moreover, the Commission fails to indicate whether the policy contained in the WFAA–TV designation Order applies to all pending renewal-new applicant proceedings. If it does, it apparently undercuts the approach employed in *Moline Television Corporation*, 31 FCC 2d 263, 22 RR 2d 745 (1971), which was adopted by the Commission after the Court of Appeals' decision in *Citizens Communications Center* and which considered the integration factor to be relevant in the evaluation of a renewal applicant. It seems unfair to both renewal and competing applicants to modify important comparative criteria on an *ad hoc* basis rather than in the context of a well-publicized Policy Statement. Therefore, while I may concede that paragraph six of the designation Order is consistent with the thrust of the *Citizens Communications Center* case and our proposals in Docket No. 19154, I cannot agree that an individual hearing order is the appropriate vehicle to enunciate such far-reaching policy. I would prefer to conclude the inquiry in Docket No. 19154, which has been pending since February, 1971.

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[1] See *UHF, Inc.* v. *The Times Herald Printing Company, T. H. Liquidating Company and the A. H. Belo Corporation*, Civil Action No. 3–4156–A, filed September 9, 1970, in the United States District Court for the Northern District of Texas, Dallas Division. Civic Telecasting Corporation has petitioned to deny the license renewal applications of Belo for Stations WFAA–AM–FM–TV on essentially the same grounds raised in the antitrust action. Action on the petition to deny is being deferred until the Commission has received sufficient information relating to the allegations made in the civil antitrust suit and the petition to deny to permit the discharge of its statutory responsibilities.

[2] See *Notice of Inquiry in Docket No. 19154*, 27 FCC 2d 580, adopted February 17, 1971. On August 4, 1971, the Commission adopted a *Further Notice of Inquiry* (31 FCC 2d 443) in light of the *Citizens Communications Center* decision and indicated that the Court of Appeals' decision reinforces the need to resolve the matters at issue in Docket No. 19154.

F.C.C. 73-543

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
A. H. BELO CORP.	File Nos. BR-395,
For Renewal of Licenses for Stations WFAA, WFAA-FM and WFAA-TV Dallas, Tex.	BRH-1192, BRCT-33
BEAUMONT TELEVISION CORP.	File No. BRCT-556
For renewal of License for Station KFDM-TV Beaumont, Tex.	
THE TIMES HERALD PRINTING CO.	File No. BRCT-85
For Renewal of License for Station KDFW-TV Dallas, Tex.	
CARTER PUBLICATIONS, INC.	File Nos. BR-404,
For Renewal of Licenses for Stations WBAP, WBAP and WBAP-TV Fort Worth, Tex.	BRH-539, BRCT-27

ORDER

(Adopted May 23, 1973; Released May 24, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER HOOKS ABSENT.

1. The Commissioner has before it for consideration an application for review of an action taken on October 27, 1971, by the Broadcast Bureau pursuant to delegated authority.[1]

2. Among other things, the action complained of directed Civic Telecasting Corporation (Civic) to respond within twenty-six days to the oppositions to the petition to deny which Civic had filed against the above-captioned license renewal applications. In so doing, the Broadcast Bureau also denied Civic's request that the time for filing its responsive pleading be extended until fifteen days after removal or modification of a protective order issued by the United States District Court for the Northern District of Texas, Dallas Division in Civil Action No. 3-4156-A, to wit:

> ORDERED AND DECREED that all exhibits, testimony and discovery in this cause shall be used in this cause only and not in any other proceeding.

3. It appears that the action complained of has unduly inhibited Civic in responding to the oppositions of the above-noted licensees and that Civic's attempts to have the court's protective order vacated or modified to permit usage of the information obtained in the court

[1] The application for review of action taken pursuant to delegated authority was filed on November 1, 1971, by Civic Telecasting Corporation. Pleadings in opposition thereto were filed on November 12 and 15, 1971, by The Times Herald Printing Company, Carter Publications, Inc., A. H. Belo Corporation, and Beaumont Television Corporation. A reply to the oppositions was filed December 1, 1971, by Civic Telecasting Corporation.

action in its presentations to the Commission have not been successful. It further appears from our preliminary examination of the pleadings before us that full and complete disclosure of all materials relating to the allegations set forth in the petition to deny is necessary to enable the Commission to effectively discharge its responsibilities under the Communications Act of 1934, as amended.[2]

4. Accordingly, IT IS ORDERED, That the aforementioned application for review IS GRANTED; that the action complained of IS SET ASIDE; and that Civic Telecasting Corporation WILL BE ACCORDED an additional period of time within which to perfect its responsive pleading.[3]

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] With respect to the nature of the allegations before us, see paragraph 5 of FCC 73-542, adopted this date.

[3] In this regard, it should be noted that the Commission is considering the various alternatives at its disposal, including a direct request to the United States District Court for the Northern District of Texas, Dallas Division that Civic be permitted to use the subject information in its pleadings before this Commission. In the meantime, action on the petition to deny will be deferred until such time as the Commission has sufficient information before it to discharge its statutory responsibilities.

F.C.C. 73-541

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CALIFORNIA WATER AND TELEPHONE CO. TARIFF F.C.C. No. 1 AND TARIFF F.C.C. No. 2 APPLICABLE TO CHANNEL SERVICE FOR USE BY COMMUNITY ANTENNA TELEVISION SYSTEMS	Docket No. 16928
In the Matter of THE ASSOCIATED BELL SYSTEM COS. TARIFFS FOR CHANNEL SERVICE FOR USE BY COMMUNITY ANTENNA TELEVISION SYSTEMS	Docket No. 16943
In the Matter of THE GENERAL TELEPHONE SYSTEM AND UNITED UTILITIES, INC., COS. TARIFFS FOR CHANNEL SERVICE FOR USE BY COMMUNITY ANTENNA TELEVISION SYSTEMS	Docket No. 17098

MEMORANDUM OPINION AND ORDER

(Adopted May 22, 1973; Released May 23, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, WILEY AND HOOKS ABSENT; COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. The Commission has before it for consideration a formal petition filed by the California Community Television Association (CCTA) on April 26, 1973. CCTA therein requested us to immediately issue an order prohibiting General Telephone Company of California, Inc. (General Telephone) from implementing an announced increase of its rental charges to cable television companies for use of its telephone poles and further prohibiting any new and additional charges to cable television operators in connection with their use of General Telephone's public utility poles.[1] In support of its request for an immediate restraining order, CCTA alleges: (1) that there is no cost justification for the proposed increase (from $3.00 to $6.00 per pole per year) and that none has been furnished despite repeated requests therefor; (2) that the increase was instituted without notice to the Commission, is contrary to prior representations of General Telephone to us, and reflects a complete disregard of our concern with pole attachment rates, practices and policies; (3) that the increase is an

[1] Also before us are a letter to Chairman Burch filed by CCTA on April 20, 1973 seeking the same relief, a letter to the Chairman filed by National Cable Television Association on April 26, 1973 in support of CCTA's request, a letter filed May 4, 1973 by General Telephone in opposition to grant of the requested stay order; and an interlocutory appeal filed by NCTA on April 26, 1972, and pleadings attendant thereto, and responses by NCTA and CCTA to General Telephone's May 4, 1973 letter filed on May 14 and May 16, 1973, respectively.

attempt to create a *fait accompli* prior to our decision in this proceeding; (4) that General Telephone's actions threaten the economic viability of the California cable operators and the ability of their industry to meet the service requirements of our regulatory program for cable television; and (5) that if General Telephone succeeds, other pole owning utilities will follow its example and our investment into this inquiry will have been diffused. In sum, CCTA would have us find that General Telephone's proposed increased pole rental charges constitute a major breach of an alleged commitment to this Commission that such charges would not be increased pending the outcome of our inquiry in this proceeding into what regulatory controls, if any, may be appropriate and that General Telephone has flouted our processes and the anti-trust laws and abused its natural monopoly power over utility poles. CCTA contends that General Telephone's action, if allowed to stand, would inflict serious damage on the broadband communications and cable television industries.

2. On April 30, 1973, prior to the announced May 1, 1973 effective date of General Telephone's proposed increase for pole attachment rates for cable television operators, we requested the telephone company to defer any and all such proposed increases and to maintain the status quo until we took further action on the petitions of CCTA and the National Cable Television Association, Inc. (NCTA). We stated that the petitions raised substantial questions with respect to the impact and propriety of the proposed increases which warranted our prompt and careful consideration. However, before taking definitive action on the petitions, we invited General Telephone to respond to the allegations and contentions made therein.

3. Pursuant to our request for its views, General Telephone's response noted that the question of the nature and extent of our jurisdiction over CATV pole attachments is before us in this proceeding which has been pending since 1966. General Telephone further noted our letters of January 1970 which requested the major telephone companies to defer any increase in pole attachment rates pending the outcome of this proceeding and our assurance therein that we would make every effort to resolve the jurisdictional question at an early date. General Telephone also stated that, contrary to CCTA's assertions, neither General Telephone or its parent, General Telephone and Electronics Corporation (GTE), ever made a commitment to the Commission to abide by our request for such deferral. General Telephone further stated that it did determine to temporarily withhold the increase in light of the abovementioned assurances. It contends that the CCTA and NCTA petitions fail to state an adequate factual or legal basis for the relief sought, even if it is assumed that we have jurisdiction to grant such relief and that grant of such relief would not be fair to the telephone subscribers in California who would be required to subsidize CATV operations. Nevertheless, General Telephone stated that, at our request, it would voluntarily defer the effective date of its proposed increase for 3 months without prejudice to GTE's position on the merits of the issues in this proceeding. In addition, General Telephone, contrary to CCTA's assertions, contends that it has furnished cost data in support of its pole rental charges in proceedings before both this Commission and the California Public Utilities Com-

mission. It also disputes NCTA's allegation that the proposed increase would contravene the Economic Stabilization Regulations of the Cost of Living Council. Finally, General Telephone contends that the anti-competitive claims against it were considered by the California Commission and that, after extensive hearings, that Commission found no federal or state antitrust implications on the record before it. General Telephone notes that the California Supreme Court denied review of that decision.[2]

4. The question raised by these pleadings is whether we have jurisdiction over the charges made by General Telephone to cable television operators for pole attachments and, if so, what action we should take with respect to General Telephone's proposed increase in such charges from $3.00 to $6.00 per pole per year. This same issue is encompassed within the broader jurisdictional issues which we have undertaken to resolve in the present phase of this consolidated proceeding, namely, the questions of (a) "What are the policies and practices of telephone companies, electric utilities, and others with respect to pole line attachment or conduit agreements or arrangements with CATV operators; (b) Whether the Commission has jurisdiction over the aforesaid agreements or arrangements beyond that exercised in its decision in Docket No. 18509 and, if so, the extent and nature of such jurisdiction and what action, if any, the Commission should take with respect thereto", 22 FCC 2d 10, 12 (1970). Thus, in our Memorandum Opinion and Order of April 22, 1970, we emphasized that the purpose of the present phase of the rulemaking proceeding herein is to obtain reliable factual data concerning pole attachment policies and practices in order to assist us in determining "the nature and extent of (our) jurisdiction in this area and the need to exercise such jurisdiction."[3] We did not concur in the presiding officer's ruling that the jurisdictional issue must be considered first on briefs prior to the reception of any evidence. At that time, we discharged him from further responsibility for consideration of such issue. We also expressed our concern that the proceeding should be expedited and conducted, within the bounds of fairness, so as to avoid undue delay.[4]

5. Unfortunately, a number of circumstances have combined to delay the early conclusion of the present evidentiary phase of this rulemaking proceeding. In this connection, we take note particularly of the initially promising but ultimately prolonged and unsuccessful attempts of the principal parties to reach a nationwide negotiated settlement of their differences. Also unforeseen was the death of the presiding officer and the need to designate a substitute therefor well into the hearings. Further contributing to uncertainty and delay was the filing of a number of interlocutory pleadings requesting reconsideration or clarification of our orders, or reversal of various rulings of the presiding officer, and our recognition of the increasing importance of the role of cable television in the United States, e.g. *Cable Television Report and Order* 36 F.C.C. 2d 143 (1972).

6. We do not concur with CCTA that General Telephone necessarily committed itself to defer all increases in its pole rental charges indefi-

[2] Order S.F. No. 22954, filed December 29, 1972.
[3] *California Water and Telephone Company, et al.*, 22 FCC 2d 586, 588.
[4] 22 FCC 2d at p. 587.

nitely pending our decision in this proceeding. Although we were disappointed with the manner in which General Telephone chose, on or about March 30, 1973, to announce and implement its proposed increase, we were pleased with the company's response to our request to defer any such increase until we took further action on the petitions of CCTA and NCTA. While we had indicated a maximum of 30 days as the period within which we might be prepared to act upon the petitions, General Telephone stated that it would, at our request, voluntarily suspend the effective date of its proposed increase an additional two months beyond such 30 days. We, hereby, do so request. This request is not intended, and should not be construed, as a finding that we have determined that the present $3 rate or the announced $6 rate is reasonable or unreasonable.

7. We must be concerned that the increased annual charges proposed by General Telephone will not impair our regulatory efforts and overall objectives for the development of broadband communications and cable television.[5] We have previously expressed our concern that pole rental practices by telephone companies could inhibit growth of the cable television industry to the extent that it would be unable to carry out its part of our national communications policy.[6] We have also required that pole attachment rental charges *per se* shall be reasonable as a condition to obtaining certificates under Section 214 of the Act. (See footnote 8, below.)

8. As indicated in our letter of April 30, 1973 to General Telephone, we are of the opinion that we should take prompt action on this matter and proceed expeditiously to resolve the broader issues herein as to our regulatory authority with respect to pole attachment agreements and arrangements between telephone companies, electric utilities and others on the one hand, and cable television operators, on the other hand. After resolving such issues, we will then take such action with regard to the specific rental charges of General Telephone as we shall decide to be necessary or desirable. Moreover, in view of the aforementioned delays in the completion of the current evidentiary phase of our proceeding herein, we are of the opinion that we should re-structure the procedures to be hereafter followed and terminate the current phase of this proceeding and spin off the jurisdictional issues for immediate comments, briefing, and oral argument *en banc*. We believe that the evidence of record to date in this proceeding, coupled with comments, briefs, oral argument and such facts and matters as we may officially notice, will provide us with an adequate basis upon which to decide the jurisdictional issues. We shall also direct the presiding officer to immediately certify the present evidentiary record to us without issuing proposed findings of fact. Such action, in our judgment, will best

[5] We have heretofore on a number of occasions expressed our concern over actual or potential anti-competitive practices of telephone companies directed against or which could be directed against cable television operators. See e.g., *TeleCable Corporation*, 19 FCC 2d 574 (1969); *Dimension Cable TV, Inc. et al.*, 25 FCC 2d 520 (1970); *Sterling Manhattan Cable Television, Inc. et al.*, 38 FCC 2d 1149 (1973); *Section 214 Certificates*, 22 FCC 2d 746 (1970); affirmed *General Telephone Company of the Southwest* v. *United States*, 449 F. 2d 846 (1971); and *National Community Television Assoc., Inc. (NCTA) et al.*, 6 FCC 2d 860 (1967). We also have taken cognizance of the United States Department of Justice's expressed concern that the existing local monopoly position of telephone companies as communications common carriers might prevent the development of an independent cable television industry. (*Section 214 Certificates*, 21 FCC 2d 307, 314, 324)

[6] See footnote 81 to *Cable Television Report and Order*, 36 FCC 2d 141, 209 (1972).

conduce to the proper discharge of our business and our responsibilities under the Communications Act and to the ends of justice. This will leave for further evidentiary proceedings before the presiding officer questions concerning the lawfulness of tariffs of the telephone companies (22 FCC 2d 10).

9. Before specifying areas in which we will welcome briefs and comments, we wish to address NCTA's interlocutory appeal which seeks to reverse certain rulings of the presiding officer. The rulings objected to excluded evidence and testimony of past practices of telephone companies concerning pole attachment practices and development of fees for pole attachment and lease of conduit space. The issue raised by NCTA's appeal is whether evidence of past practices and policies is relevant and admissible to show the character and purpose of present pole attachment practices and policies. Since we have decided that the present phase of the evidentiary hearings should be immediately terminated, and since NCTA's interlocutory appeal is not addressed to the tariff issues that are to be the subject of further evidentiary proceedings herein, that appeal is now moot and will be dismissed. Our dismissal of the appeal should not be construed as foreclosing parties from addressing past practices and policies bearing directly on the jurisdictional issues herein.[7]

10. Accordingly, we invite the parties herein and any other person or entity wishing to submit views to file briefs or other written comments for our consideration upon the jurisdictional questions we must decide, viz., whether the Commission has jurisdiction over the agreements or arrangements of telephone companies, electric utilities, and others with respect to pole line attachment or conduit agreements or arrangements with CATV operators beyond that exercised in its decision in Docket 18509 and, if so, the extent and nature of such jurisdiction and what action, if any, the Commission should take with respect thereto.[8] We particularly request comment upon the following:

(a) Are utility poles[9] "wire communication" and/or "radio communication" within the meaning of subsections (a) and (b), respectively, of Section 3 of the Communications Act when such poles are leased to cable television operators?

(b) Are any pole rental charges or practices of public utilities applicable to cable television operators a "charge" or "practice" within the meaning of Section 201(b) of the Communications Act?

(c) Are the pole rental charges or practices of public utilities to cable television operators "charges, practices, classifications, regulations, facilities, or services for or in connection with . . . communication service" within the meaning of Section 202(a) of the Communications Act?

(d) What jurisdiction under the Communications Act does the Commission possess to regulate pole rental charges and practices of (1) telephone common carriers (2) public utilities other than telephone common carriers and (3) other persons or entities to cable television operators?

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[7] We stress, however, that we are principally concerned with deciding the legal issues of our jurisdiction and not with resolving disputed questions of fact.

[8] Our rules presently require a showing in applications of telephone common carriers for authority to construct or operate distribution facilities for channel service to CATV systems that, among other things, the CATV system proposed to be served had available, at its option, and within the limitations of technical feasibility, pole attachment rights (or conduit space, as the case may be), at reasonable charges and without undue restrictions on the uses that may be made by the CATV operator of its own facilities. Such requirement (i.e., section 63.57 of our rules) and our policy decisions accompanying its adoption in Docket 18509 were judicially affirmed. See *Section 214 Certificates*, 22 FCC 2d 746, 754 (1970); affirmed, *General Telephone Company of the Southwest* v. *United States*, 449 F. 2d 847 (1971).

[9] The term "pole" shall also include the term "conduit" as used herein unless the context otherwise requires.

(e) Should the Commission promulgate general guidelines governing the charges and practices with respect to pole rental arrangements.

(f) If the Commission has authority to assert jurisdiction over pole rental charges and practices by telephone common carriers or other public utilities, should it do so in any case where such charges and practices are subject to regulation by a State Commission or by local governmental authority, whether or not such State or local governmental authority has asserted its regulatory jurisdiction? If jurisdiction is asserted, in whole or in part by this Commission, should we promulgate broad guidelines and leave to the discretion of the State and/or local governmental authorities the manner in which such guidelines are to be implemented where such authorities have regulatory jurisdiction?

(g) If the Commission has authority to assert jurisdiction over pole rental charges and practices of public utilities, does such authority include the power to (1) order the suspension of the effective date of any such new or revised charge or practice *pendente lite*, (2) require appropriate refunds of charges found to be excessive, and (3) require appropriate additional payments to the utility for charges found to have been unreasonably low?

(h) If CATV pole attachment activities are not found to be a common carrier communications service subject to tariff regulation, how may the Commission protect telephone ratepayers from burdensome contracts for such activities and ensure that such activities do not result in technical or economic impairment of a carrier's primary public services?

(i) Should the Commission require carriers and other utilities to file, for information purposes, a copy of their respective CATV pole attachment agreement forms currently in use, and if such forms be amended, a copy of each such amended form showing the effective date of any such amendment?

11. In view of the foregoing, IT IS HEREBY ORDERED, pursuant to Sections 4(i), 4(j), 208 and 403 of the Communications Act of 1934, as amended, That the issue of the nature and extent of the Commission's jurisdiction over the policies and practices of pole rental charges to cable television operators by telephone common carriers and by other public utilities IS, HEREBY, Designated for Oral Argument before the Commission *en banc* in Washington, D.C. commencing on July 24, 1973 at a time to be specified by subsequent order.

12. IT IS FURTHER ORDERED, That the parties herein and any other person or entity may file briefs or other written comments addressed to this issue on or before July 2, 1973 and replies on or before July 16, 1973.

13. IT IS FURTHER ORDERED, That each person or entity intending to participate in the oral argument shall file a brief in accordance with the preceding paragraph, and a statement of intention to appear, specifying the amount of time requested, by no later than ten (10) days from the release of this document. The Commission reserves the right to select appropriate spokesmen to participate in the oral argument, and it is not to be presumed that all parties who file a statement of intention to participate will be allowed to so participate.

14. IT IS FURTHER ORDERED, That the Presiding Officer is Directed to terminate the present phase of the evidentiary hearings forthwith and to promptly certify the record to the Commission without issuing proposed findings of fact.

15. IT IS FURTHER ORDERED, That NCTA's interlocutory appeal IS DISMISSED as moot.

16. IT IS FURTHER ORDERED, That the petitions of CCTA and NCTA ARE GRANTED and DENIED to the extent reflected herein and otherwise shall be held in abeyance pending our decision on the jurisdictional issues here before us, or our further order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-558

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
DARRELL K. BURNS, TRADING AS COMMUNITY
BROADCASTING CO., BRIGHAM CITY, UTAH
Has: 800 kHz, 250 W, Day
Requests: 800 kHz, 500 W, Day
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted May 23, 1973; Released May 29, 1973)

BY THE COMMISSION:

1. The Commission has before it for consideration the above application for a daytime power increase for station KBUH, Brigham City, Utah, and a request by the applicant for a waiver of revised rules adopted February 21, 1973, to govern the acceptance of applications for new standard broadcast stations and major changes (including power increases) in existing stations.[1]

2. The proposed KBUH power increase does not comply with section 73.37(e)(3)(ii) or (iii) because (i) all of the community of Brigham City, Utah, is included within the existing KBUH 5 mV/m contour, and (ii) all of the proposed KBUH gain area presently receives primary service from at least one other standard broadcast station.[2]

3. In support of a request for waiver, the applicant states that Brigham City is the county seat of Box Elder County and that the power increase is needed to help serve as much of the county as possible; that KBUH would like to provide a 5 mV/m signal over the communities of Tremonton and Garland; and that only KBUH broadcasts special events that are of interest to residents of Box Elder County.

4. With regard to the applicant's comments regarding 5 mV/m service to Tremonton and Garland, we note that the engineering studies accompanying the application show that both communities are provided with a signal of at least 2 mV/m from the presentKBUH operation. Under our rules [section 73.182(f) and (g)], a signal strength of this value is considered primary service for towns with populations in excess of 2,500. A signal of 5 mV/m over a city is not required unless one is attempting to meet the coverage requirements for a city of license.

[1] Report and Order adopted February 21, 1973, FCC 73-220, 26 RR 2d 1189.

[2] The note to section 1.571 provides that no application for broadcast facilities in the conterminous United States tendered for filing after July 18, 1968, will be accepted for filing unless it complies fully with the provisions of section 73.24(b) and the provisions of section 73.37 (a) through (e).

5. Having considered the applicant's comments, we find that the proposed power increase is inconsistent with our allocation goals. It is clear from the comments submitted that the waiver request is based primarily on the contention that increased power is needed to serve as much of Box Elder County as possible. In our Report and Order adopting revised rules to govern the acceptance of applications for new standard broadcast stations and major changes (including power increases) in existing stations (see footnote 1, *supra*), it was emphasized that power increases would be authorized only if it could be demonstrated that the applicant's existing operation would not provide adequate service to its city of license or that a first aural service would be provided to a substantial area or population. In this regard, the applicant's engineering exhibits clearly establish that the present operation of KBUH provides service to its city of license in accordance with our rules. In addition, our studies reveal that the proposed power increase would not provide a first primary service to any area or population since the proposed gain area receives service from other existing stations. Recently, in denying an applicant's request for waiver of our rules to permit a power increase we stated: [3]

> In addition, under section 307(b) of the Communications Act, the Commission's mandate to provide for a 'fair, efficient and equitable distribution of radio service' includes the consideration of operating *power*. The proper distribution and utilization of power is, of course, as important to efficient allocation as is the consideration of frequencies. Inefficient utilization of power depletes available spectrum space as certainly as improper utilization of frequencies. . . . We cannot conclude that a power increase which would merely add an additional service is in the public interest.

6. Insofar as service to Box Elder County is concerned, we would note that if we were to attempt to authorize power increases so as to permit existing stations to serve their entire home county rather than city of license, the required power in many instances, would be so great that the standard broadcast band could not possibly accommodate all of the existing stations (over 4,300). As we previously indicated, all of the area which would be served by the proposed KBUH power increase receives service from existing stations.

7. In view of the foregoing, we find that the applicant has failed to present sufficient reasons, if true, to justify waiver of the rules which would permit acceptance of its application. Therefore, a hearing on the request for waiver is not required. *United States* v. *Stores Broadcasting Company*, 351 U.S. 192 (1956).

8. Accordingly, IT IS ORDERED, That the applicant's request for waiver IS DENIED and that the application IS RETURNED as not acceptable for filing.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[3] *KACY, Inc.*, FCC 73-483, adopted May 9, 1973, —— FCC 2d ——.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
RONALD E. BOYER, STATES ATTORNEY, WATSEKA, ILL.
Concerning Fairness Doctrine Re Radio Station WGFA, Watseka, Ill.

MAY 15, 1973.

RONALD E. BOYER, Esq.,
State's Attorney,
Iroquois County Courthouse,
Watseka, Ill.

DEAR MR. BOYER: This is with reference to your December 8, 1972 fairness doctrine complaint against the licensee of Radio Station WGFA, Watseka, Illinois.

You allege that station WGFA and its Vice-President and General Manager, Mr. Robert Bivans, violated the fairness doctrine by broadcasting one side of the controversy surrounding the pay increases of certain Iroquois County officials without affording a reasonable opportunity for the presentation of contrasting views on that issue. You also allege that WGFA broadcast a five minute editorial four times a day for two weeks, opposing the pay increases while, to your knowledge, the only attempt to present contrasting views was an editorial on November 21, 1972 and a letter addressed to Mr. Bivans and read by him on November 22, 1972. In addition, you allege that the station's 14 minute "Hot Line" program devoted extensive amounts of time to discussions opposing the pay increases.

In response to Commission inquiries of January 31 and April 4, 1973, WGFA stated that the pay increases of certain Iroquois County officials involved a controversial issue of public importance in the community at the time of the broadcast, and that although WGFA's editorial and 'open-mike' discussions favored rescinding these pay increases, it had provided a reasonable opportunity for the presentation of opposing viewpoints, including a personal invitation to you and others. In response to our April 4 inquiry WGFA stated that you did not accept its November 27, 1972 offer to present your views. However, your April 13 reply thereto stated that you were never invited to use WGFA's facilities for rebuttal. WGFA's responses also deny the allegations that the open mike announcer was prejudicial in his comments and that he engaged in the practice of cutting some callers' comments short if they did not agree with the station's position on the matter. WGFA also states that its editorials are always concluded in the following manner, "WGFA offers equal rebuttal time to any of our editorials to any responsible person or parties requesting

time," and that neither the complainant nor others favoring the pay increases approached the station for rebuttal time.

Under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it must afford a reasonable opportunity for the presentation of contrasting views. The broadcast licensee has an affirmative duty to encourage and implement the broadcast of views in its overall programming, which, of course, includes statements or actions reported in the news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views.

WGFA acknowledges that the pay increase issue was a controversial issue of public importance. It states that the station's policy was in accordance with the fairness doctrine inasmuch as it encouraged the broadcast of contrasting views on the pay issue and offered you time which you refused. Although the information before the Commission indicates that only on two occasions during the two weeks in which the controversy was discussed were views in favor of the pay increases broadcast, it does not appear that any spokesman took advantage of the rebuttal time offered. The station's response to the April 4, 1973 Commission inquiry asking "what steps you took during this time to comply with your obligations under the fairness doctrine" states that:

> After airing [our] editorials that week . . . not once did he [Mr.] Boyer take advantage of rebuttal time which our station offers to each editorial which concludes thusly: 'WGFA radio offers equal time to any of our editorials to any responsible person or parties requesting time'. Since they did not use our rebuttal time, I took it upon myself to read a letter which the State's Attorney submitted to our local paper and to me.
>
> The one letter referred to as Exhibit G in the complaint, which by the way was was the only letter other that the State's Attorney's which WGFA received in opposition to the issue, was submitted by the Assistant State's Attorney . . .

The question here is whether WGFA acted reasonably and in good faith in its presentation of the pay increase issue. How best to present contrasting views on a controversial issue of public importance is a programming judgment initially to be made by the licensee, and the Commission will review that judgment only to determine the reasonableness of that decision and the good faith of the licensee.

The Commission, in *Mid-Florida Television Corporation*, 40 FCC 620 (1964), stated the following in discussing what constitutes compliance by a licensee with his fairness doctrine obligations:

> The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine . . . Our experience indicates that licensees have chosen a variety of methods, . . . Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds contrasting viewpoints with respect to a controversial issue presented . . . communicate to such an individual or group a specific offer to the use of their facilities for the expression of contrasting opinions, and send a copy or summary of the material broadcast on the issue . . . Still others announce at the beginning or ending (or both) of the programs presenting opinions on controversial issues that opportunity will be made available for the expression of contrasting views

upon request by responsible representatives of such views . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith, to choose the precise means of achieving fairness.

In light of the above, it appears that WGFA has complied with at least one of the methods set forth by the Commission by which a licensee can comply with the requirements of the fairness doctrine. By concluding its editorials "WGFA offers equal rebuttal time . . . to responsible parties requesting," it stated its readiness to afford the opportunity required by the fairness doctrine for contrasting views to be presented.

Mr. Bivans also stated that he personally offered you the use of WGFA's facilities during a special meeting of the County Board on November 27, but that you "mumbled something from the back of the room and laughed." Although you "categorically" denied that an offer of time was made to you, you have not denied that the events as described by Mr. Bivans occurred during the November 27 meeting. The fairness doctrine does not prescribe any particular method for conveying offers of time; in the absence of further information, it appears that an offer was extended in good faith for use of the station's facilities. In light of all the facts presented, it does not appear that WGFA has failed to comply with its obligations to afford a reasonable opportunity for the presentation of contrasting views.

With respect to your allegation that Mr. Bivan's membership on the Iroquois County Board constitutes a conflict of interest, the Commission has stated that "the conflict of interest principle need not generally be extended to professional, personal or business relationships which involve no element of financial gain or loss." *Letter to NBC*, 14 FCC 2d 713 (1968). A licensee's obligation to serve the public interest does not preclude it from editorializing on matters on which it has an opinion. Therefore, based on the facts presently before the Commission, it does not appear that Mr. Bivans' membership on the County Board or his opposition to the pay increases constituted a private financial interest in the matter.

Accordingly, on the basis of the information before the Commission, it cannot be said that WGFA acted unreasonably in this matter.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
SHERWYN M. HECKT, SPOKANE, WASH.
Concerning Fairness Doctrine Re Station KREM–TV

MAY 17, 1973.

AIRMAIL
Mr. SHERWYN M. HECKT,
N. 2934 Wiscomb,
Spokane, Wash.

DEAR MR. HECKT: This refers to your complaint of September 8, 1971 against station KREM–TV, Spokane, alleging violation of the fairness doctrine. You stated that you were a member of the "Environmental Action Council of Spokane," a group formed expressly to oppose the staging of "Expo 74"—an international exposition to be held in Spokane in 1974; that a vote on a bond issue for "Expo 74" was to be held on August 31, 1971; that it had been scheduled only six weeks prior to the voting date; and that your group was loosely organized since there was only a short time in which to prepare an opposition to the proposed bond issue. You stated that KREM–TV, knowing this, refused to recognize the group as representatives of the opposition, and refused to afford the group time to present its views on KREM–TV, thus effectively minimizing opposition to the proposal in violation of the fairness doctrine. In addition, you declared that your group was summarily excluded from a 30-minute discussion program, "What is Expo all About," three days before the matter was to be voted on, although the group had been given a firm commitment for a time to appear for taping its views, and that the program was reconstituted to include five persons, all of whom were admitted proponents of "Expo 74." [1] You also stated that as an example of the station's alleged bias, the program producer said, five minutes prior to the end of that show, "what this has been up to now is a meeting of the 'Expo 74 Boosters.'" Further, you claimed if one were to "look solely at the time allotted to pro and con on KREM it would be more than 3 hours for pro and less than 15 minutes for con," with the "proponents getting virtually everything in the last week." You also said that the station "continued to lard its newscasts and another public information program about 'Expo 74' only with arguments favorable to it. Viewers could scarcely be aware that opposition existed"; that seven members of your group met with the show producer, Mr. Wes Lynch, on one occasion and that four met on another occasion with the station manager, Mr. Eugene Wilkin, and each time were promised time to

[1] The program was broadcast on August 28 and 29.

present their views; that the station management could have ascertained from these meetings that they represented an opposing viewpoint which should have been aired; that your group had been recognized by three other stations in the community as a principal spokesman for those opposing "Expo 74," and the group was given adequate coverage by those stations; and that the KREM–TV manager was influenced to violate his obligation to present opposing views on the bond issue by the fact that he was a member of the Board of Directors of the "Expo 74" corporation.

The original complaint of September 8, 1971, was sent to the licensee for its comments. The licensee responded by letter of October 12, 1971. You then sent the Commission a reply to the response on October 31, 1971. Under date of December 2, 1971, the licensee replied to your second letter. Following a further response of May 11, 1972, by the licensee, the Commission staff conducted a field investigation June 5–9, 1972. Additional inquiry to the licensee was made by the Commission on December 6, 1972, and the licensee replied by letter of February 6, 1973. Your allegations, the field investigation, and the licensee's comments thereto, raised factual issues concerning the adequacy of the opportunity afforded for expression of opposing views.

In the licensee's response of February 6, 1973, it stated, in reference to the station's efforts to present contrasting viewpoints:

". . . the station provided an opportunity for a meaningful exploration of the various points of view on Expo in both its public affairs programs and in its other programming as well. From the date the bond referendum was approved by the city council until the bond issue election, the station carried 21 stories, *in its news programs*, related to Expo; . . . that of these, nine presented opponents of Expo . . . including Dr. Hubbard and his associate Mr. Reynolds; Don Longmore, Chairman of Citizens Against Expo; and a report on the activities of Citizens Against Residential Freeways (a group which initially considered that the Expo project might lead to a controversial freeway through downtown Spokane).

". . . the station's editorial on the Expo bond issue was mailed to a standing list of 194 community leaders and to an additional list of 200 members of the public picked at random from the telephone directory . . . this step was taken as an extra precaution to help assure that the station reached potential opponents. Each letter carried a statement inviting requests for airtime by responsible spokesman of opposing views. . . . the station had written to 22 Spokane area organizations early in the referendum campaign to see if they were opposed to Expo. Significantly, only six groups responded, and none indicated opposition. . . .

"Moreover the station made far more than an effort to reach Mr. Longmore, Chairman of Citizens Against Expo. It made repeated efforts over several days. The station first learned of Mr. Longmore's opposition to the bond issue in July through ads placed in a small local publication, *TV Adviser*. The station arranged on August 10, to film a statement by him two days later at his home for use on 'Expo 74–Q&A.'

The appointment coincided with a wire service story concerning the formation of Citizens Against Expo and his election as chairman of that group. This development became the subject of a news interview with Mr. Longmore." [2]

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

[2] The information before the Commission indicates that the licensee's efforts to contact Mr. Longmore included telephone calls to him on August 26 and 27, a telegram on August 27, and a personal visit on August 27 in which a copy of the August 27 editorial was given to Mr. Longmore.

However, under the fairness doctrine, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

Although the information before the Commission indicates that very little programming was actually presented by the licensee which reflected the anti-bond viewpoints, it appears that the licensee took a number of steps in an effort to obtain such views. Thus it made repeated efforts to reach Mr. Longmore so that it could present his further views regarding the bond issue. In addition the licensee had written to 22 Spokane area organizations early in the referendum campaign to see if they were opposed to Expo 74, and none indicated opposition. As to the editorials, the licensee states that it broadcasts the following at the close of each of its editorials:

> Aware of it's responsibility to the community in presenting a balanced view, KREM–TV invites a responsible spokesman with a direct interest in the issue to contact the station to express an opposing view.

The licensee further stated that it had mailed the August 27 editorial to nearly 400 individuals, including 194 community leaders. It appears that in response to all of the foregoing no one except you contacted the station regarding the presentation of views opposed to the bond issue. In *CBS, Inc.* (*KNX*), 34 FCC 2d 773 (1972), the Commission stated: "Although it rejected the only person volunteering to present contrasting views, on the grounds that he was not an appropriate spokesman, we are not disposed to second-guess a licensee in judging the qualification of a particular person as a spokesman, provided that the licensee appears to have made a reasonable effort, overall, to obtain responsible representation of contrasting views." Thus, licensees have wide discretion in the selection of spokesmen in fulfilling their fairness doctrine obligations. As to whether the licensee made reasonable efforts in the instant case, the Commission in, *Mid-Florida Television Corporation*, 40 FCC 620 (1964), stated the following in discussing what constitutes compliance by a licensee with his fairness doctrine obligations:

> The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine . . . Our experience indicates that licensees have chosen a variety of method, . . . Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds contrasting viewpoints with respect to a controversial issue presented . . . communi-

cate to such an individual or group a specific offer to the use of their facilities for the expression of contrasting opinions, and send a copy or summary of the material broadcast on the issue . . . Still others announce at the beginning or ending (or both) of the programs presenting opinions on controversial issues that opportunity will be made available for expression of contrasting views upon request by responsible representatives of such views . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith, to choose the precise means of achieving fairness.

In light of the above, it appears that KREM–TV complied with at least one of the methods set forth by the Commission by which a licensee can fulfill the requirements of the fairness doctrine. By concluding its editorials with invitations to "a responsible spokesman" it stated its readiness to afford the opportunity required by the fairness doctrine for contrasting views to be presented. In addition, its contacts with Mr. Longmore also constitute efforts by it to afford opportunity for contrasting views.

As pointed out above, a licensee has considerable discretion in determining how it should fulfill its fairness doctrine obligations. The test is not how the Commission would have handled a particular situation involving a controversial issue of public importance, but whether it can be said that the licensee acted unreasonably in the way it acted. We do not believe that such a finding can be made here.

With respect to your allegation that Mr. Wilkin's membership on the Expo 74 Board constituted a conflict of interest, the Commission has stated that "the conflict of interest principle need not generally be extended to professional, personal or business relationships which involve no element of financial gain or loss." *Letter to NBC*, 14 FCC 2d 713 (1968). A licensee's obligation to serve the public interest does not preclude it from editorializing on matters on which it has an opinion. Here the licensee has stated that Mr. Wilkin's membership on the Expo 74 Board was a "non-paying function on the board of a non-commercial community endeaver"; and that "Mr. Wilkin neither intended to cause nor did he in fact cause the News Department to handle the Expo story in any other than an objective manner." Under these circumstances it does not appear that Mr. Wilkin's membership on the Expo 74 Board involved "financial gain or loss" as contemplated by the above-cited *NBC* case.

In view of the foregoing, it appears that no further action by the Commission is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be send to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM R. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of
PROMOTIONAL ACTIVITIES BY GCC COMMUNICATIONS OF HOUSTON, INC., RADIO STATION KRBE (FM), HOUSTON, TEX.

MAY 22, 1973.

GCC COMMUNICATIONS OF HOUSTON, INC.,
RADIO STATION KRBE (FM),
8208 Westpark Drive,
Houston, Tex.

GENTLEMEN: This is in reference to your letter of February 19, 1973, concerning your promotional activities on December 19 through 22, 1972.

You state in your letter that your entertainment programming from 3:00 p.m. December 19 to 12:10 p.m. December 22, 1972 (69 hours, 10 minutes) consisted of the repeated broadcast of a three-minute song entitled "Rock and Roll Part II" by Gary Glitter. During this period you continued to present your non-entertainment programming as represented to the Commission in your most recent renewal application. You state that the reason for the repeated broadcast of the song was to bring attention to the fact that your format had been changed from automated to live service, and to other changes in your operation.

The selection of records is a matter within the licensee's discretion. But the constant repetition of *any* record so as to constitute the station's entire entertainment format for a long period of time raises a question whether the licensee is making a good faith programming judgment to fulfill his public trustee role or whether he is subordinating that role for his private promotional purposes. The latter appears to be the case in the circumstances presented here and your actions appear to have been inconsistent with the public interest responsibilities of a licensee.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
Broadcast Bureau

F.C.C. 73-480

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 91.554 OF THE RULES TO REDESIGNATE FREQUENCIES 33.40 MHz AND 42.98 MHz AS AVAILABLE EXCLUSIVELY FOR LOW-POWER WIRELESS MICROPHONES	RM-2031

MEMORANDUM OPINION AND ORDER

(Adopted May 9, 1973; Released May 11, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. Special Instruments Laboratory, Inc., of Knoxville, Tennessee, has petitioned for amendment of Part 91, Section 91.554 of the Business Radio Services Rules to allocate the frequencies 33.40 MHz and 42.98 MHz for the exclusive use of low-power wireless microphones.

2. In support of this request, the petitioner argues that allocation of the two frequencies, as proposed, will greatly facilitate the use of wireless microphones by educational and business institutions, by improving the quality of service and thereby increasing the effectiveness of wireless microphones.

3. We have carefully considered the petitioner's request and the arguments forewarded and have concluded that it would be contrary to the public interest to grant the petition. The frequencies involved in this petition are among a number of frequencies already available for use by low-power (0.5–3 watts) equipment, including wireless microphones. Since all of these frequencies are limited to low-power operations, they can and have been shared extensively for many and varied purposes, including wireless microphones, without substantial interference problems. Allocation of the two frequencies exclusively for wireless microphones would unnecessarily deny their use for many other worthwhile purposes. Additionally, Part 15 of the Commission's Rules permits non-licensed operation of wireless microphones on frequencies in the bands 10–490 kHz, 510–1600 MHz and 26.97–27.27 MHz as well as in the 88–108 MHz band, under the technical requirements prescribed. Thus, it appears that the existing rules make reasonably adequate provision for wireless microphones and that the petitioner has not demonstrated sufficient justification for granting its petition.

4. Accordingly, the Commission concludes it would not be in the public interest to grant the subject petition. IT IS ORDERED, therefore, That the petition of Special Instruments Laboratory, Inc., (RM–2031) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of McPHERSON BROADCASTING, INC., McPHERSON, KANS. For Construction Permit for New FM Station	BPH–7909

MARCH 9, 1973.

MCPHERSON, KANS., APPLICATION FOR NEW FM STATION GRANTED. An application by McPherson Broadcasting, Inc. for a new commercial FM station to operate on Channel 244A (96.7 MHz), with power of 3 kw and antenna height of 245 feet, at McPherson, Kans., has been granted by the Commission (BPH–7909). McPherson Broadcasting is licensee of AM station KNEX, McPherson, and its principals, Mr. and Mrs. K. R. Krehbiel, own the community's only daily newspaper, the *McPherson Sentinel* (circulation 5,600). (Action by the Commission March 2, 1973. Commissioners Robert E. Lee and Reid, with Commissioners Burch (Chairman), H. Rex Lee, Wiley and Hooks concurring, and Commissioner Johnson dissenting and issuing a statement.)

McPHERSON OWNERSHIP—DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

[Re Application of McPherson Broadcasting, Inc.]

Today the Commission majority establishes still another regrettable precedent for the consolidation of ownership of the local media in small American communities.

The Krehbiel family, already owners of the only AM service and the only daily newspaper in McPherson, Kansas, is today granted authorization by the FCC to construct the only FM station as well. Except for the papers of the local high school and local college, all the rest of the media that finds its way to McPherson does so from some source outside the community. Just as I considered such a small town monopoly extremely unhealthy in Manhattan, Kansas, *Manhattan Broadcasting Co., Inc.*, 33 F.C.C. 2d 934 (1972); in Bedford, Pennsylvania, *Fort Bedford Enterprises*, 11 F.C.C. 2d 981 (1968); and in Niles, Michigan, *Niles Broadcasting Co.*, FCC Public Notice 13195, February 21, 1968, I consider it unhealthy in this case, and once again I dissent.

McPherson, Kansas is a small town of nearly 11,000 people perched on the Kansas prairie about 50 miles from the nearest big city (Wichita, population 276,000). Nearly everyone in town gets the Krehbiels' paper, the *McPherson Sentinel* (it has a daily circulation of 5,600

homes), but some folks also get papers from Wichita, Hutchinson and even Kansas City. Since broadcast signals from those cities and towns can also be heard in McPherson (ten radio and four television), the majority feels there is sufficient diversity to justify the instant grant.

The problem is that such reasoning makes no distinction between coverage of national or regional news and the many things that require coverage at the *local* level. The original broadcasting decision made in this country was to allocate the airwaves in such a way that they might serve local communities rather than regional or national requirements. Considerably more frequency space was required for that method of allocation, but the objective of an "informed electorate" at the smallest unit of government practicable in an area was thought to outweigh the inefficiencies that might result.

While this Commission has shown itself open in the recent past to considerations of local concentration of control, its analysis ultimately was limited to prospective pronouncements about AM–FM–TV combinations and vague reaffirmations of its duopoly strictures against AM–AM, FM–FM, or TV–TV combinations in the same or partially overlapping markets. See my dissent in *Amendment of Multiple Ownership Rules*, 28 F.C.C. 2d 662, 678 (1971). However, local combinations of AM–FM-newspaper—by all odds the most significant threat to small, independent (*i.e.*, non-suburban) communities like McPherson—have never been seriously considered. Indeed, I note with dismay that the Commission no longer even sees fit to rationalize or defend its lack of regulation, as it did in the virtually identical *Manhattan Broadcasting* case, where it said:

> Since the applicant is the licensee of the only commercial broadcast station in Manhattan, and since the applicant's principals control a daily newspaper published in the city, a possible question as to concentration of control of the mass media is raised. *Since we propose to grant the application without a hearing, we shall set out below our reasons for doing so.* 33 F.C.C. 2d at 934 (emphasis added).

This time, sadly, we get nothing but a Public Notice, with the "justifications" for granting the application set out nowhere but in our brief staff memo of explanation. In addition to the highly capricious conclusion that media from cities 50 miles away can satisfy McPherson's need for *local* diversity of ownership, however, there is nothing in the staff memo that even vaguely approaches a "public interest" justification for granting this application.

The fact that this frequency has been vacant for ten years is admittedly a factor to be weighed in determining whether it should be granted to this family. Today's grant *will* provide a local transmitter for nighttime FM service (presumably of music) to supplement the programming available from neighboring cities.

Quite frankly, however, if it were my town—as, indeed, it was once my father's—I would prefer to see the channel go unused for the time being rather than increase the *potential* for abuse inherent in the Krehbiels' control of *all* non-school outlets for local media expression. It may not mean much nationally, but for the 11,000 residents of McPherson one person might as well own the three networks and two wire services, so far as local programming is concerned.

When the day does come that towns of this size can support competing media, no FM operator in the country could hope to compete

with another local FM that had the resources of the only local newspaper and AM behind it. Thus, by today's expediency we make competition even more difficult in the future. This is but one more example of an area in which the Commission tramps all over the "public interest" in the cause of serving the interests of business only to discover it hasn't served business interests very well either.

The argument that the two wholly-owned companies are "separate and distinct corporate entities with separate general managers, separate staffs, separate physical locations and are operated as competing businesses" would never fool a potential competitor. It would not hold water before any antitrust court in the country, nor should it with the members of this Commission.

I don't know the Krehbiels. Nor do I intend to cast aspersions on their honor or intentions, which I would be prepared to discover are of the highest. It is just that there is *no* family in the country to whom I would wish to give this amount of control over the local media outlets in *my* community, and, accordingly, I dissent.

F.C.C. 73-478

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 0 OF THE COMMISSION'S RULES TO DELETE LISTINGS OF MONITORING STATIONS AT IMPERIAL BEACH, CALIF. AND MARIETTA, WASH., AND TO ADD LISTING FOR FERNDALE, WASH.

ORDER

(Adopted May 9, 1973; Released May 10, 1973)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission will close monitoring facilities at Imperial Beach, California and Marietta, Washington effective June 30, 1973. Simultaneously, construction will begin at a new facility at Ferndale, Washington. Part 0 of the Rules and Regulations will be amended at this time by deleting the listing of the facilities at Imperial Beach, California and Marietta, Washington, and by adding a listing for Ferndale, Washington. The amendments are set forth in the attached Appendix.

2. Because these amendments relate to internal agency organization, the prior notice, procedural and effective date provisions of the Administrative Procedure Act [5 USC 553] do not apply. Authority for these amendments is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

3. In view of the foregoing, IT IS ORDERED, effective July 1, 1973, that Section 0.121 of the Rules and Regulations is amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 0 of Chapter I of the Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 0.121(c) is revised to read as follows:

(c) Monitoring stations are located at the following addresses:

* * * * * * *

(Add) Federal Communications Commission, Ferndale Monitoring Station, Post Office Box 1125, Ferndale, Washington 98248.

* * * * * * *

(Delete) Federal Communications Commission, Imperial Beach Monitoring Station, Post Office Box 1087, Imperial Beach, California 92032.

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(Delete) Federal Communications Commission, Marietta Monitoring Station, Post Office Box 339, Bellingham, Washington 98225.

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F.C.C. 73-540

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INQUIRY INTO SUBSCRIPTION AGREEMENTS BETWEEN RADIO BROADCAST STATIONS AND MUSICAL FORMAT SERVICE COMPANIES	Docket No. 19743

NOTICE OF INQUIRY

(Adopted May 17, 1973; Released May 23, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. The Federal Communications Commission is undertaking a study of the subscription agreements between licensees of radio broadcast stations and musical programming format service companies such as Stereo Radio Productions, Ltd. (SRP), Bonneville Program Services, and TM Productions, Inc. This study is being conducted to determine whether the provisions of such subscription agreements impinge upon, hinder or inhibit the exercise of licensee descretion and flexibility in matters of the selection and presentation of non-musical programming to meet the continuing needs and interests of the station's service area. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry* (FCC 60-970 20 RR 1901, 1914).

2. We have reviewed certain subscription agreements between such musical format service companies and broadcast licensees and we find that some of them contain restrictive provisions concerning the nature and amounts of the news and other non-musical programming which the subscribing station may carry. (To illustrate the types of restrictions which give rise to our concern, we have attached hereto the pertinent provisions of one such subscription agreement.) In view of the apparent widespread existence of such contracts and agreements (we are aware that one company has over 60 subscribing stations), the Commission does not deem it feasible or sound administrative policy to attempt resolution of the questions posed thereby on an *ad hoc* basis within the context of pending applications. Rather, we believe that a general inquiry proceeding is the best method of providing the Commission with the necessary information to determine the nature and scope of the problems (if any) which may be posed by these contracts and the proper methods for their resolution. Accordingly, by this Notice of Inquiry, we wish to elicit comments from the broadcast licensees, musical programming format companies and other interested parties on the following points:

(1) the extent to which subscription agreements of musical program format companies contain restrictive provisions regarding non-musical programming (we would expect to receive copies of the standard contracts of companies providing these services);

(2) the particular industry practices under such agreements, including (but not necessarily limited to) the degree to which licensees have been allowed to deviate from the standard provisions without rescission or threatened rescission of the contract by the format service company (specific instances would be helpful); and

(3) the extent to which, if any, such restrictive programming provisions and practices thereunder impinge upon, inhibit or hinder the descretion and flexibility of the licensee in matters of the selection and presentation of non-musical programming material.

3. We wish to make it clear that the fact that we invite comments upon the above enumerated matters does not mean that we are limiting our inquiry to these specific aspects of these subscription agreements. On the contrary, we encourage interested parties to submit any material which they think will aid the Commission in resolving the questions presented by these subscription agreements.

4. Authority for the inquiry instituted herein is contained in Sections 4 (i) and (j), 303 and 403 of the Communications Act of 1934, as amended.

5. Interested parties may submit comments on or before June 28, 1973. Reply comments may be submitted on or before July 10, 1973. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

6. Although this is not a formal rule making proceeding, an original and 14 copies of all comments, replies, pleadings, briefs or other documents filed in this proceeding shall be furnished to the Commission as provided in Section 1.419 of the Commission's Rules governing such proceedings. Filings shall also conform to the provisions of Section 1.49 (47 C.F.R. Sections 1.49, 1.419 (1967).

7. Responses will be available for public inspection during regular business hours in the Commission's broadcast and docket reference room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

EXAMPLE OF RESTRICTIVE PROVISIONS IN SUBSCRIPTION AGREEMENT BETWEEN BROADCAST LICENSEE AND MUSICAL FORMAT COMPANY

11. (a) Station represents that its present program and operating policies, based on surveys and investigations of community needs in accordance with the rules, regulations and policies of the Federal Communications Commission include the following:

(1) Station plans to broadcast a minimum of nineteen (19) hours per day, including the period 6 a.m. to 1 a.m.

(2) Station does not intend to duplicate the programming of any AM facility, including news broadcasts.

(3) Subject to subparagraphs (6) and (7) below, Station plans to broadcast at least fifty (50) minutes of [Company] music during each hour Station is on the air and does not plan the use of its own music or other music services in normal broadcast except as required for commercials or other announcements. Station does not plan to broadcast four-channel stereo.

(4) Station does not plan to announce the names of the musical selections played by the Station on the air in order to avoid breaks in Station's program continuity.

(5) Station plans to broadcast no more than six (6) commercials per hour and no more than four (4) commercial breaks in the continuous broadcast music per hour. Opening and closing billboards for sponsored programs or newscasts are considered commercials for the purposes of this subparagraph (5). Station does not plan to permit the triple-spotting of commercial announcements.

(6) All discussion, talk, sports or special events programs broadcast by Station (whether sustaining or commercial) will be of a public affairs or religious nature.

(7) Station's regular news programs will originate from non-network and non-oral sources which normally will exclude the "use of actuality" phone or tape reports. Station plans to devote five (5) percent or less of the total time Station is on the air to news programs. During the hours 8:00 a.m. to midnight, Station plans to have one newscast each hour of two (2) minutes duration or less.

(8) Station does not plan to use a Subsidiary Communications Authorization (SCA) for any purpose, including both background music and remote transmitter readings.

(9) Station plans to broadcast [Company] music with full dynamic range and without the use of automatic gain control (a.g.c.) equipment.

(b) Nothing herein contained shall in any way be deemed to preclude Station at any time, from making any modifications, changes or alterations in the program and operating policies above enumerated if Station feels that the public interest, convenience and necessity, or the efficient operation of the Station so require. In the event Station elects to modify, change or alter the program and operating policies set forth in this and in paragraph (a), [Company] shall have the right, on fifteen (15) days' written notice to Station, to terminate this Agreement without penalty of any kind to Station. In the event of such termination, Station will promptly return to [Company] any [Company] tapes in its possession and [Company] will promptly refund to Station any portion of the prepaid subscription fee.

(c) It is understood that nothing contained in this Agreement shall be construed to prevent or hinder Station from rejecting or refusing any program offered by [Company] which Station reasonably believes unsatisfactory or unsuitable for broadcast or contrary to the public interest, or from substituting a program of outstanding local or national importance.

109-041—73——3

F.C.C. 73-539

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TECNICO LEASING, INC. (ASSIGNOR) and SOUTHERN BROADCASTING CO., INC. (ASSIGNEE) For Assignment of License of Station WEZX(FM), Tampa, Fla.	File No. BALH-1723; BASCA-520

MEMORANDUM OPINION AND ORDER

(Adopted May 17, 1973; Released May 24, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS ABSENT; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. We have before us for consideration: (a) an application for voluntary assignment of the license of Station WEZX(FM), Tampa, Florida, from Tecnico Leasing, Inc. to Southern Broadcasting Co., Inc.; (b) a Petition to Deny filed by WWBA, Incorporated; (c) a Joint Opposition to the Petition filed by Tecnico Leasing, Inc. and Southern Broadcasting Company; (d) Reply to Joint Opposition filed by WWBA, Incorporated; (e) Joint Response of Assignor and Assignee (Applicants) to Petitioner's Reply.

2. The aforementioned application for assignment of license and SCA of Station WEZX(FM) was accepted for filing on September 12, 1972.[1] On October 12, 1972, WWBA, Incorporated (WWBA), licensee of Station WWBA(FM), St. Petersburg, Florida, filed a Petition to Deny the subject application.

3. Petitioner's claim to standing under Section 309(d) of the Communications Act and Section 1.580 of our Rules is based upon its contention that a grant of this application

> "will permit a multi-owner broadcast entity to compete with Station WWBA-FM for local, regional and national advertising. Based upon the assignee's financial plans in BALH-1723, Petitioner will be faced with increased competition for advertising revenues, and its public audience to the detriment of Petitioner and . . . to the public interest. . . ."

Petitioner contends that this is sufficient to confer standing under Section 309(d) of the Act citing *FCC v. Sanders Bros., Radio Stations 309 US 470; Southwestern Operating Co. v. FCC 351 F 2d 834 (1965)* and *Folkways Broadcasting Co., Inc. v. FCC 8 RR 2d 2089 (1967)*.

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[1] Southern Broadcasting Co., Inc. (Southern) is the licensee of Station WTOB, Winston-Salem, North Carolina; Stations WKIX and WYYD(FM), Raleigh, North Carolina; Station KOY, Phoenix, Arizona; Station KULF, Houston, Texas; Station WSGN, Birmingham, Alabama; Stations WRVA and WRVQ(FM), Richmond, Virginia; Station WGHP-TV(VHF), High Point-Greensboro, North Carolina; Station WEZI(FM), Memphis, Tennessee; and has a 32.67% interest in WBMG-TV(UHF), Birmingham, Alabama. (There is pending an application to assign the license of WBMG-TV from Birmingham Television Corporation to Roy H. Park Broadcasting of Birmingham, Inc.). Southern also has pending applications to acquire Stations KRFM(FM), Phoenix, Arizona and KYND(FM), Pasadena, Texas.

Applicants, in their "Joint Opposition", dispute Petitioner's claim to standing on the grounds that Petitioner is not faced with a new station coming into the market and that it has failed to show the requisite injury to it which would flow from a grant of this application. In its Reply pleading, Petitioner attempts to bolster its claim to standing with reference to a September 29, 1972 judgment it received against assignor in an unfair competition suit [2] and also cites the Commission's ruling on standing in the recent case of *In re application of Robert P. Adams et al.* (KUTE–FM) 38 FCC 2d 1 (1972).

4. Without deciding the question of standing, we have carefully considered the matters raised in the Petition on their merits. This approach is consistent with our actions in other cases where even a holding adverse to the Petitioner on the threshold question of standing has not foreclosed our examination of the merits of the petition, e.g., *Mel-Eau Broadcasting Corp.*, 10 FCC 2d 537, 11 RR 2d 655 (1967); affirmed sub. nom. *Broadcast Enterprises, Inc. v. FCC*, 39 F 2d 483 [12 RR 2d 2001] (1968); *Clay Broadcasters, Inc.* 21 RR 2d 443 (1971).

5. The assignor and assignee also state that the Petition must be dismissed because the allegations of fact have not been supported by the affidavit of a person with personal knowledge thereof as required by Section 309(d)(1) of the Communications Act and Section 1.580(i) of the Commission's Rules. WWBA's Petition to Deny is not supported by any affidavit. There is an Affidavit of Ed Winton appended to the Petition, and incorporated into the Petition as "a personal knowledge affidavit of Petitioner's President and General Manager". However, this is not an affidavit addressed to all of the allegations contained in the Petition to Deny, since numerous allegations in the Petition are not covered in the Affidavit of Ed Winton. In answer to this contention the Petitioner merely states: "Contrary to Respondents contentions as to supporting affidavits and injury, Petitioner has complied with the requirements of Section 309 of the Communications Act of 1934, as amended, and Section 1.580 of the Commission's Rules". The Winton affidavit does not cover all of the allegations of fact which are made in the Petition to Deny. However, these partial procedural defects will not here affect our treatment of the substantive allegations in the Petition which, as stated above, have been considered on their merits.

6. Turning now to the substantive matters, Petitioner charges: (1) that the Assignor, though ostensibly selling because of financial losses, has for many months been utilizing the broadcast music service of Stereo Radio Productions (hereinafter SRP or "Schulke Format"); that this service is expensive; and that the assignor's financial exhibits fail to reveal this expense item; that certain restrictive provisions in the SRP subscription agreement are contrary to the public interest; and, Petitioner questions the source of payment for the service; (2) that, in its ascertainment of community needs, the assignee has ignored the Primer in that it has not related disclosed problems to proposed program service, nor is the proposed service specific as to time, duration and frequency of broadcast; (3) that the language used by the

[2] Case No. 72–212485 in the 13th Judicial Circuit in and for Hillsborough County, Florida. Information in the pleadings before us indicates that unfair competition suit concerned the exclusive use of a label describing a particular musical format.

assignee in its statement of program service (Section IV–A) is similar to that used in the assignee's application to acquire Station WEZI, Memphis, Tennessee (BALH–1722); (4) that the assignee must be judged in light of the multiple ownership rules of the Commission (Section 73.240(a)(2)); (5) and, that there is injurious competition between WWBA(FM) and WEZX(FM).

7. In response to these charges the assignor and assignee have submitted an Affidavit of the Assignor's President, Frederic T. C. Brewer, which points out that the cost for the "Schulke Format" is included in the assignment application; that it was paid for by the Assignor; that the station started broadcasting the format on May 20, 1972; and that it had been considered and discussed for use at its two stations for at least two years. In connection with the charge concerning programming, the Petitioner sets forth no facts outside of what has been filed with the application for assignment. The same holds true for the charge of language similarity in two applications filed by the assignee. There is no allegation as to how this raises public interest questions. In mentioning multiple ownership, the Petitioner merely states a Commission rule and points out that the assignee already has two FM outlets. Any multiple ownership problems, as well as programming, ascertainment and equal employment submissions, are considered by the staff in processing every application and have been considered here. We find that a grant of this application is consistent with our multiple ownership rules and policies. The economic injury charge has not been substantiated, nor has it been related in any way to possible detriment to the public interest.

8. With respect to the restrictive provisions in the SRP subscription agreement, these provisions contain certain restrictions upon the nature and amounts of the news and other non-musical programming which the subscribing station may carry. These restrictions raise questions as to whether the subscribing licensees will retain the necessary discretion and flexibility to program their stations in the public interest. We are informed that SRP has similar agreements with 60 other radio stations and that the subscription agreements of other musical format service companies may also contain restrictive provisions relating to non-musical programming. In view of the apparent widespread existence of such contracts and agreements the Commission does not deem it feasible or sound administrative policy to attempt resolution of the questions posed thereby on an *ad hoc* basis within the context of pending applications. Rather, we believe that a general inquiry proceeding is the best method of providing the Commission with the necessary information to determine the nature and scope of the problems (if any) which may be posed by these contracts and the proper methods for their resolution. Accordingly, we have this day issued a "Notice of Inquiry" concerning these contracts.[3] We therefore conclude that the SRP agreement with WEZX is not a bar to the grant of this application. We will however make this grant on condition that it is without prejudice to any action which the Commission may take in connection with the Notice of Inquiry.

[3] Notice of Inquiry in the Matter of "Inquiry into Subscription Agreements between Radio Broadcast Stations and Musical Format Service Companies", Docket No. 19743, FCC 73–540 ——, Released on May 23, 1973.

9. With exception to the matters covered by our Notice of Inquiry, we find all of the Petitioner's charges speculative and conclusory. The Petition sets forth no specific allegations of fact to show that a grant of the application would be *prima facie* inconsistent with the public interest. We have carefully examined the complaint and papers before us and find that there are no substantial and material questions of fact that remain unresolved. We find that the assignee is fully qualified and that a grant of the application will serve the public interest, convenience, and necessity. Accordingly, the Petition to Deny, filed by WWBA, Incorporated is DENIED, and the application for assignment of license of Station WEZX(FM), Tampa, Florida, from Tecnico Leasing Inc. to Southern Broadcasting Co., Inc., is GRANTED subject to the following conditions:

1. Grant of the subject application is without prejudice to whatever action the Commission may deem appropriate upon conclusion of the proceedings entitled *In re Applications of Southern Broadcasting Company (WGHP–TV), High Point, North Carolina. For Renewal of Broadcast License, et al. Docket No. 18906 et al.;* and the proceedings in *United States v. Wachovia Corporation and American Credit Corporation, Civil Action No. 2656, in the United States District Court for the Western District of North Carolina.*[4]

2. This grant is also make subject to the condition that it is without prejudice to whatever action the Commission may deem appropriate upon conclusion of the proceedings entitled, "Inquiry into Subscription Agreements between Radio Broadcast Stations and Musical Format Service Companies" (Docket No. 19743).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[4] Southern's High Point television station is in a comparative renewal proceeding in which issues have been added which go to Southern's basic qualifications. The proceeding against the Wachovia Corporation and American Credit Corporation is a civil anti-trust action. Two of Southern's directors, Albert L. Butler, Jr. and Gordon Hanes, are also directors of the Wachovia Corporation.

F.C.C. 73-554

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of TROPICAL RADIO TELEGRAPH CO. Application for Authorization, Pursuant to Section 214 of the Communications Act of 1934, To Acquire and Operate One Satellite Voice Circuit Between the United States and Italy and Beyond	File Nos. T-C-2335-1; T-C-2335-1-A

MEMORANDUM OPINION AND ORDER

(Adopted May 23, 1973; Released May 25, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it two petitions requesting reconsideration of the Commission's *Memorandum Opinion, Order, Authorization and Certificate*, released herein July 19, 1972[1] (hereinafter *Order*), which granted authority under Section 214 of the Communications Act to Tropical Radio Telegraph Company[2] (TRT) to extend its lines so as to provide record communication services and alternate voice/record leased channel service between the United States and Italy and points beyond. Both petitions were filed on August 18, 1972, one by RCA Global Communications, Inc. (RCA) and the other by Western Union International, Inc. (WUI).[3] Also before the Commission is the record of prior proceedings in this matter, on remand from the U.S. Court of Appeals for the District of Columbia Circuit for the purpose of affording ITT World Communications Inc. (ITT) an opportunity "to advance its contentions and request for relief" with respect to ITT's claim of unreasonable delay in Commission action.[4] The record on appeal was remanded on the Commission's motion to permit the Commission to develop an appropriate record for review purposes on the question whether the Commission had unreasonably delayed action on ITT's proposal for revisions in the Formula for the Distribution of Outbound International Traffic. It is ITT's contention in part that the Commission should have acted on the long-standing proposal to amend the formula before considering the much

[1] 35 F.C.C. 2d 950 (1972).

[2] Tropical Radio Telegraph Company has recently changed its corporate name to TRT Telecommunications Corporation.

[3] The Commission also has before it an opposition filed by TRT to the petitions for reconsideration and RCA's and WUI's replies thereto.

[4] ITT Worldcom on August 11, 1972, filed a Petition for Review of the TRT *Order* in the Court (No. 72-1771), seeking reversal of the Order and asking the Court to compel Commission action on ITT Worldcom's proposal for modification of the Formula for the Distribution of Outbound International Traffic (International Formula). The Formula allocates among international common carriers the unrouted outbound message traffic—*i.e.*, the traffic for which the sender has not specified a carrier, 47 U.S.C. Section 222(e). See 10 F.C.C. 184 (1943) for the order adopting the Formula.

more recently filed TRT application. Finally, the Commission has before it for consideration a tariff filed on April 11, 1973, by TRT setting forth rates for service to Israel, Jordan, Lebanon, Kuwait, Pakistan, the Philippines and Thailand, via interconnection with ITALCABLE. (See paragraph 21, *infra.*)

2. In its July 19, 1972 *Order*, the Commission authorized TRT, which serves the public from Miami, Florida, and New Orleans, Louisiana, to acquire and operate one satellite voice circuit between an earth station in Etam, West Virginia and an appropriate satellite over the Atlantic Ocean to be interconnected with a similar circuit between the satellite and an earth station near Rome, Italy furnished by ITALCABLE, TRT's Italian correspondent. Connecting facilities were also authorized to connect the circuit between Etam and TRT's Florida operating office. After taking data submitted by TRT showing the estimated telegraph and telex traffic that it expected to handle and the revenue derived therefrom during the first year of operation with Italy and comparing those estimates with traffic and revenue figures previously compiled by the Commission from carrier reports for the U.S.-Italy and U.S.-Europe markets for recent past years, the Commission determined that the U.S.-Italy-Europe market was sufficient to sustain the introduction of another competitor and, further, that the adverse effects upon the other record carriers presently providing service in this market would be insubstantial.[5] Thus, the Commission found competition to be reasonably feasible. It then noted reasons why it expected that the public would benefit from the authorized service. In this regard, it first recognized previous Commission reliance on the fact that competition between direct circuits generally results in public benefits derived from new and improved services and lower rates and then went on to show the proposed service by TRT, by routing telex and telegraph traffic southward to Miami, Florida, one of TRT's gateway cities, would serve to alleviate a then existing congestion problem at Western Union Telegraph Company's (WUTelCo) New York exchanges.[6] The Commisison, moreover, pointed out how the proposed service would benefit TRT customers in TRT gateway cities by giving them direct access to an international record carrier who could provide service to points other than points in Latin America—access which would then be comparable to that provided to customers

[5] 35 F.C.C. 2d at 958. The Commission found that TRT's estimated telegraph message traffic to Italy during the first year of operations would amount to only 1.6% of the Commission estimated total United States Mainland/Italy 1971 outbound telegraph message volume. This was compared with the following shares of the 1970 outbound telegraph message volume and revenues of the three existing U.S. record carriers serving Italy: ITT—30.04% of message volume, 24.63% of revenues; RCA—19.24% of message volume, 24.51% of revenues; and WUI—50.49% of message volume, 50.64% of revenues. As to telex, the Commission estimated that TRT's estimated telex traffic from the U.S. to Italy during the first year of operations would amount to approximately 2% of estimated 1971 total outbound telex message volume to Italy. Again this percentage was compared with the following shares of the 1970 outbound telex message volume and revenues of the three existing U.S. record carriers: ITT—31.31% of messages, 33.52% of revenues; RCA—23.62% of messages, 25.40% of revenues; and WUI—44.99% of messages, 41.04% of revenues. Id. at 957–58.

[6] Id. at 959. To support this proposition, the Commission cited a finding of fact in Docket No. 19036, a proceeding in which all the U.S. record carriers were parties, that congestion did exist at WUTelCo's New York exchange. Since the adoption of the July 12, 1972 *Order* the Commission has received a letter, dated September 29, 1972, from WUTelCo stating that that congestion has, to a great extent, been alleviated. However, in a letter received from WUI on October 17, 1972, in response to WUTelCo's letter, WUI noted that, while there has been some improvement, the situation is still not satisfactory.

in other gateway cities. It also took notice of TRT's diminishing Central American operations as locally owned entities were authorized to provide service in these countries [7] and the competition it faced in that market from other international carriers.[8]

PETITIONS FOR RECONSIDERATION

3. In its petition, WUI requests reconsideration of the Commission's *Order* and a hearing to consider the public interest factors surrounding TRT's application. First, WUI asserts that the Commission did not give proper consideration to TRT's possible growth in its analysis of TRT's impact on the U.S.-Italy-Europe market and thus overlooked its potential ability to disrupt the present pattern of telex and message traffic in the European market. To support this contention, WUI cites the fact that control of TRT was acquired in 1969 by AMK Corporation (AMK), a large conglomerate enterprise with total assets in excess of $200 million. AMK merged in 1970 with United Fruit Company, forming United Brands Company, which WUI states has total assets of over $1 billion and capital surplus and retained earnings of over $400 million. Since AMK obligated itself to provide needed financial support to TRT,[9] an obligation assumed by United Brands,[10] WUI contends that TRT's entry into the European market may provide an incentive and an obligation for TRT's present parent corporation to finance TRT's promotion of its European service, expansion of its facilities and consequent diversion of European traffic to TRT. WUI claims also that TRT's traffic projections since they failed to take into account this possible infusion of large amounts of capital, are not reliable. As a second ground, WUI challenges the accuracy of TRT's traffic estimate and claims that they do not meet the standards of Section 1.363 of the Commission's Rules with respect to statistical data offered in hearings. WUI claims it is more important that these requirements be complied with when the Commission acts without a hearing, as in this case, because the Commission is foregoing the benefit of the fact-finding mechanisms available in a hearing proceeding. WUI also suggests that any loss of business that TRT may suffer because of problems in the small-volume Central American countries may be more than compensated by TRT's further expansion into the "lucrative and growing" market in South America where there is "room enough for growth... without further fractionalizing the European market which is already highly competitive." [11] Lastly, WUI claims that a fourth competitor should not be introduced into the U.S.-European market at a time when American Telephone and Telegraph Company (AT&T) is attempting to enter into the international public switched data field.

[7] Id. at 959–60. Here, the Commission noted that in 1964, TRT was replaced in Costa Rica by Radiografica; in 1966 TRT was replaced in Guatemala by GUATEL; in 1970, TRT was ejected from El Salvador; and that in late 1972, it would be replaced by a governmental communications entity in Nicaragua.

[8] As we noted in our *Order*, in 1969, TRT obtained 9.2% of the telegraph message traffic between the United States and Latin America, while ITT, RCA and WUI obtained 40.4%, 19.9% and 30.5% respectively. In 1971, TRT obtained 8% of the telegraph message traffic between the United States and Latin American and West Indian points it serves, while ITT, RCA and WUI obtained 53.8%, 20.2% and 17.7% respectively.

[9] Transfer of control of TRT to AMK, 17 F.C.C. 2d 933, 937 (1969).

[10] Transfer of control of AMK to United Brands, 28 F.C.C. 2d 95 (1971).

[11] WUI Petition, August 18, 1972, p. 5.

WUI claims that if this is allowed, the existing record carriers' U.S.-Europe market would be threatened and would not be able to sustain a fourth competitor.

4. RCA has also petitioned the Commission for reconsideration in the form of a hearing. RCA also contends that the Commission has taken an unduly narrow view of the TRT application and should have, in the context of a hearing, considered the fundamental question posed by the application, in view of TRT's companion filing for 90 TAT–6 circuits to Europe—the impact of a fourth carrier competing on a significant scale with carriers now serving Europe for all services they now offer. To RCA, the entry of such a competitor would upset a balance now existing in the industry and adversely affect existing carriers' ability to serve the public and make further rate reductions. Second, RCA claims that the Commission's own economic analysis fails to support the conclusion that the U.S.-Italy record communication market can support a fourth competitor. More specifically, RCA asserts that data for 1970 and 1971 included in the analysis show that the industry telegraph revenues declined in 1971 from the previous year to a greater extent than telex revenues increased in the same period. Thus, it claims that total revenues declined by $5,939, contrary to the Commission's statement that a loss in telegraph revenues is "well compensated by gains in telex traffic, so that another carrier working from a small traffic base might be accommodated." RCA also contends that the Commission's consideration of TRT's non-jurisdictional Central American difficulties is irrelevant to the instant application; that the Commission's comparison of TRT's relatively small operating revenues with those of the other carriers begs the question and ignores the economic factors discussed by RCA; that TRT should not have been awarded authority to provide private-line voice-record services since TRT did not request or justify such authority; and, lastly, that in light of an application RCA has pending before the Commission,[12] which proposes inter alia to reestablish its operations from New Orleans and to expand its present operations in Miami, the instant authorization to TRT constitutes "favored treatment," since a grant of the RCA application could provide customers in Miami and New Orleans with a carrier servicing Europe.

TRT'S OPPOSITION

5. In its opposition to the petitions for reconsideration, TRT says that RCA and WUI repeat arguments previously advanced as a basis for a hearing, which were properly rejected. Moreover, TRT maintains, RCA and WUI took a radically different approach on the recently concluded TAT–6 proceeding in which, despite its "towering importance," RCA and WUI urged expeditious action, eventually securing Commission approval without a hearing.[13] According to TRT, this demonstrates that RCA and WUI selectively assert the need for a hearing "when it will impede the opportunity of a poten-

[12] File No. T–C–2449.
[13] Memorandum Opinion, Order and Authorization, adopted July 7, 1972, 35 F.C.C. 2d 801 (1972).

tial competitor to begin making inroads, however slight, upon these carriers' vested interests." [14]

6. Turning to the specific arguments raised in the petition, TRT claims that questions raised by WUI concerning TRT's potential growth in the U.S.-Europe market and financial assistance from its parent would not be clarified by a hearing since, given the many obstacles and uncertainties that it must overcome before attaining the status of full-fledged competitor for U.S.-Europe traffic, there is no way to predict its potential growth. As to WUI's claim that the TAT market study did not meet the standards of Section 1.363 of the Rules, TRT asserts that Section 214 applications are to be judged instead by the requirements of Section 63.01 of the Rules, which only require 214 applicants to produce "estimated added revenues and costs." TRT also contends that the suggestion by WUI that TRT should expand into the South American market, rather than the European, *a fortiori* supports its entry into the European market, since such market is much larger than the South American market in which the other three international carriers are nearly as entrenched as they are in Europe. Lastly, TRT states that its application does not in any way involve the international switched data controversy and thus WUI is interjecting an irrelevant matter.

7. With respect to the arguments raised by RCA, TRT argues that the Commission, in considering the potential impact of TRT's entry into the European market on the present "balance" achieved by RCA and its competitors, is under no obligation to preserve any particular "balance" but is obliged to insure that the public interest will be served by the regulated industry. TRT responds to RCA's argument that the Commission's conclusions regarding U.S.-Italy-Europe traffic are unsupported by its own analysis by claiming that the Commission correctly did not look solely at U.S.-Italy telegraph-telex traffic for the abnormal years 1970–71 but correctly looked at a longer period which showed a tremendous increase in telex traffic, which more than compensated for the decline in telegraph message traffic. TRT also claims that the Commission was justified in considering TRT's Central American difficulties and financial record in determining whether TRT should be allowed to commence the requested service since the weight of authority dictates that regulatory agencies may take into account all relevant matters bearing on the exercise of their public interest responsibilities. TRT also contends that the "same considerations that prompted the Commission to certify TRT to commence the message, telex and record leased channel services . . . justify the grant of TRT's authority, on an equal footing with the other international carriers, to offer AVR alternate voice/record leases." [15] Finally, TRT finds in RCA's argument with respect to its own application to expand its operations in Miami and to New Orleans an attempt to delay a grant of TRT until RCA itself can expand into TRT's gateways and solicit its customers.

[14] TRT Opposition, September 11, 1972, p. 3.
[15] Id. at 6.

REPLIES TO TRT'S OPPOSITION

8. In its reply filed October 2, 1972 to TRT's opposition, WUI asserts that TRT's contention that WUI and other carriers should be precluded from urging a hearing on TRT's application because they requested expeditious handling of their TAT–6 applications is "patently irrelevant," since such applications have no bearing on TRT's entry into the European market and involve different considerations. Secondly, WUI contends that the financial resources of TRT's parent are relevant because the Commission partly based its *Order* on the argument that TRT was a small company whose introduction into the European market should not inconvenience the carriers serving the European market. In this regard, WUI asserts that TRT's desire to expand can be seen from its application to acquire and operate 90 circuits in the TAT–6 cable and that only by means of a hearing will the Commission be able to determine the vital factor of the intentions of TRT's corporate parent with respect to the infusion of funds into TRT during the seventies. WUI reiterates its argument that the evidentiary safeguards contained in Section 1.363, which pertain to statistical studies introduced at a hearing, indicate that it is more important that the Commission not decide the TRT issue without a hearing on the basis of "studies" that do not attempt to meet these standards. WUI also contends that the question of AT&T's entry into the international switched data market is important because if AT&T were permitted to enter that market between the U.S. and Europe, it would radically change the economic basis underlying the present record market structure and thus invalidate the Commission's assumptions concerning that market. Finally, WUI, without stating its reasons, contends that TRT's argument—that the suggestion by WUI that TRT expand in South America *a fortiori* supports TRT's position with regard to Europe—is fallacious.

9. On September 25, 1972, RCA replied to TRT's opposition. RCA agrees that the Commission's primary obligation is to the public and says that, in fulfilling this primary obligation, the Commission must weigh the "benefits to be achieved by competition per se against the burdens on the ratepayers associated with the authorization of duplicate and redundant facilities." [16] RCA submits that the record in this proceeding is not adequate to reach a decision on whether the public benefit resulting from the entry by TRT into an area already being served by three other carriers outweighs the detriment to the public which may result if rate reductions are deferred or service quality is impaired. Relying on *FCC v. RCA Communications, Inc.*,[17] RCA asserts that the Commission cannot merely "assume that competition is bound to be of advantage." [18] RCA further contends that, while making this determination, the Commission must consider TRT's instant application in the context of "TRT's current campaign of aggrandizement",[19] an effort characterized by filings seeking authority to use New York as a gateway for traffic to Latin America, to acquire satellite circuits between the U.S. and Puerto Rico, and to participate

[16] RCA Reply to TRT Opposition, September 25, 1972, p. 2.
[17] 346 U.S. 86 (1953).
[18] Id. at 97.
[19] RCA Reply to TRT Opposition, September 25, 1972, p. 3.

in TAT–6. RCA contends that "[f]or the Commission to foster unilaterally a major restructuring of the transatlantic market for record communications now would necessarily upset the existing arrangements between the U.S. carriers and their foreign correspondents." [20] Disrupting these delicate arrangements, RCA asserts, could result in a "breakdown of such major international undertakings as the TAT–6 cable project." [21] Finally, RCA fails to see how the authorization for telegram and telex services to TRT can be used as authority to offer alternate voice/record leased channel service, as evidenced by TRT's using this Commission authorization as a basis for approaching government agencies to obtain leased channel traffic.

DISCUSSION

10. Our *Order* granting TRT authority to operate one satellite circuit between the United States and Italy and beyond discussed the basic issues presented by the RCA and WUI petitions for reconsideration. In the *Order* we concluded that the carriers opposing TRT's application had "not demonstrated that as a matter of law or equity we are required to hold a hearing before acting on the application . . . or that the public interest would be served by the holding of such a hearing." [22] In their petitions for reconsideration, WUI and RCA have not brought forth issues of fact or law to show that a grant by the Commission of their petitions in the form of a hearing would serve the public interest.[23]

11. The RCA and WUI petitions for reconsideration have a common basic thrust. Both petitioners contend that the Commission has taken a narrow view of TRT's application, ignoring the real question raised—TRT's entrance into direct service to Europe generally, placing too little emphasis on TRT's potential growth in Europe, and thus underestimating the impact that TRT would have on the other carriers and, consequently, on their ability to serve the public. RCA and WUI would have us look beyond the limits of TRT's application to a time when TRT might pose a significant threat as a European competitor. The realization of such a threat, they feel, would have an adverse impact upon them and thus the public. However, in determining what the effects would be of TRT's limited direct entry into a portion of the European market, we did not consider it necessary to evaluate the effects of TRT's possible long-term growth in Europe as a whole. A similar question was raised in the TAT–6 proceedings, in which we did consider it necessary to evaluate the effects of TRT's entry into the European market generally. There we considered TRT's application for 90 TAT–6 circuits to serve points in Europe directly with ITALCABLE and other foreign correspondents with whom TRT may in the future obtain operating agreements. We dismissed such application without prejudice to a later filing because TRT did not provide us with "the necessary data which would support the grant

[20] Id. at 5–6.
[21] Id.
[22] 35 F.C.C. 2d at 960.
[23] Pursuant to Section 1.763(6) of the Commission's Rules and Regulations, the Commission has discretion in determining if a hearing will be held on a Section 214 application.

of an application of a fourth carrier to enter generally into the market to compete for traffic to Europe, Africa and the Middle East." [24] In the instant case, however, TRT sought direct service only to Italy, via one circuit, not to Europe generally via 90. We found ample justification in the application for direct service to Italy, and indirect service to points via the facilities of ITALCABLE. Since TRT was not applying for direct service to European points generally, we did not find it necessary to consider the effects such direct service might have upon the other carriers. As to future TRT growth in Europe, this, of course, depends on whether TRT seeks authorization to serve other points in Europe and, if so, whether it can present data sufficient to support a finding that a grant of any such application is in the public interest. We did not and do not now find it appropriate to consider, in acting on the instant application, the broader question presented by TRT's TAT–6 application—that of TRT acquiring circuitry for use in providing direct service to Europe generally, nor do we think that it is appropriate to withhold action on this application until such time as TRT may apply, in accordance with our TAT–6 decision, for such broad authority.

12. We determined on the basis of TRT's 1971 financial structure [25] and the estimated projection of traffic and revenues that TRT would obtain from the proposed service [26] that one satellite circuit to Italy would and could have little impact upon the three principal record carriers.[27] RCA and WUI assert that the data advanced by TRT does not support the grant of the application. WUI claims that the survey from which TRT's revenue estimates were derived did not meet Section 1.363 requirements. We note that this argument had not been raised before the Commission prior to its decision. We also note that Section 1.363 does not apply to TRT's application and thus TRT's application did not have to comport with its provisions. Section 214 applicants must comply with the provisions of Section 63.01(m) of the Commission's Rules which require the applicant to present "estimated added revenues and costs and the basis therefor" in its economic justification of the proposed service.[28] TRT estimated its total telex telegraph traffic projections on the basis of a survey which indicated that 87% of its customers would use TRT for *some* of their European traffic and further on the assumption that it could obtain one-fourth

[24] *Memorandum Opinion, Order and Authorization*, July 12, 1972, p. 30.

[25] 35 F.C.C. 2d at 958. The Commission here noted that TRT had an operating income of $832,147 and a net income before taxes of $1,118,331 for 1971 and compared that with the combined operating income of $43,442,237 and net income before taxes of $43,344,649 at year-end 1970 for the three principal U.S. record carriers.

[26] See fn. 4 supra.

[27] 35 F.C.C. 2d at 958. Here the Commission concluded that:

> [T]he U.S.-Italy-Europe market is sufficient to reasonably sustain the introduction of another competitor and that the adverse effects on the other record carriers will be *de minimis* and will not impair their ability to effectively and efficiently serve the public.

In making this determination, the Commission followed the guidelines formulated by the Supreme Court in *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), and restated by the Commission in *Mackay Radio and Telegraph Co. Inc.*, 28 F.C.C. 231 (1960). In that decision the Commission stated:

> It is clear . . . that before the Commission may make a grant . . . it must conclude ultimately . . . that competition . . . is reasonably feasible. . . . [F]easibility of competition depends on whether there is sufficient traffic to support the addition of another competing direct circuit and upon the effect of the opening of such circuit upon the applicant as well as other carriers providing service to the public. Id. at 239.

[28] Section 63.01(m) of the Commission's Rules and Regulations requires that a 214 application contain "Economic justification for the proposed project including, where the application involves an extension into new territory at present not directly served by the applicant, estimated added revenues and costs and the basis therefor."

of the U.S.-Italy and beyond traffic of these customers.[29] Use of such a methodology to estimate the added revenue and costs for the proposed service is adequate to satisfy the requirements of Section 63.01(m). The Commission, after finding the projected revenues and costs not to be unreasonable, used them in evaluating TRT's impact on the U.S.-Italy and beyond market. WUI contends that this Commission reliance was unwarranted yet it fails to point out specific defects or shortcomings of the TRT estimate other than to assert that it does not meet the requirements of a section of the Commission rules that does not apply. As noted we are of the opinion that the estimated added revenues and costs to TRT of the proposed service not only satisfy the relevant requirements of the Commission's rules but also provided an appropriate basis upon which the Commission could analyze TRT's impact on the market. The possibility of the infusion of large amounts of capital into TRT's operations by its parent company is a contingency which neither the Commission nor anyone else can predict. Furthermore, no showing has been made of how such infusions could affect the volume of traffic which TRT might receive.

13. RCA also challenges the data presented and the conclusions reached by the Commission pointing to the net decreases of the combined telex and telegram industry-wide revenue for U.S.-Italy service, as evidenced by a comparison of revenue figures for the first half of 1970 with those for the first half of 1971, RCA argues that the Commission's economic analysis fails to justify the conclusion that the U.S.-Italy and beyond market can support a fourth competitor. In this regard, it should be noted that the Commission recognized in its *Order* that message telegraph traffic between the United States and Italy has remained essentially static during the period 1961 through 1969 and declined sharply in 1970–71, "with 1971 appearing . . . to be the poorest of the years shown." However, it noted that telex traffic had shown very large percentage increases each year during the period from 1964 through 1970[30] and that the recessionary trend during 1970–71 contributed to the sharp decline in telegraph traffic during those two years. From this we concluded that, while U.S.-Italy telegraph traffic was slowly declining, the boom in telex traffic more than compensated for the decline in message traffic and would nearly offset that decline even during the recessionary years. It does not follow that the net decline in U.S.-Italy industry-wide revenues demonstrates the invalidity of our conclusion that the U.S.-Italy and beyond market can sustain a fourth competitor. This decline in revenues reflects the effect of the then existing economic down-turn as well as a reduction in telex rates mandated by our *Order* authorizing the TAT–5 cable,[31] matters we took into full consideration in our analysis. Subsequent events have indicated that our original analysis was correct. Annexes A and C of this Order contain a comparison, similar in format to RCA's, of the industry-wide revenues for the first half of 1971 with those from the first half of 1972. It appears clearly that

[29] TRT Amended Application, November 23, 1971, p. 9–10. TRT assumed it had an even chance with the other three major international carriers to compete for the U.S.-Italy and beyond traffic requirements of its customers, a relatively optimistic assumption in light of the established position of the other three record carriers in the European market.

[30] See 35 F.C.C. 2d at 962–63, Annexes A and C.

[31] *Memorandum Opinion, Order and Authorization*, 13 F.C.C. 2d 124 (1968).

in that period the growth in telex traffic more than compensated for the declining telegraph market thus restoring the historic pattern.

14. WUI alleges that the U.S.-Europe market is threatened by the possible entry of AT&T into the international switched data field and that, therefore, a fourth record carrier should not be authorized at this time. This is a matter presently being fully considered by the Commission in the context of an inquiry into overseas dataphone service.[32] Such *Inquiry* was instituted subsequent to the grant of the instant application, and we do not believe that it is consistent with administrative efficiency to withdraw such a prior granted authority except under exceptional circumstances. WUI should direct its concerns relative to the impact of international dataphone on the record carriers U.S.-Europe market to this *Inquiry*.

15. WUI's suggestion that TRT's expansion should be directed to the South American market because there is "more room" for growth in that market than in the European market avoids the real question involved in the instant authorization. The issue is not whether there is more room for competition in one market than in another but whether competition in the market the applicant is requesting to serve is reasonably feasible, and offers some public benefit. Since we in our July 12, 1972 *Order* have shown that the entry of TRT into the U.S.-Italy and beyond market can be sustained by that market without significant harmful effects upon the three principal U.S. record carriers, the allegation, even if correct, that the South American market may have more overall growth potential is irrelevant.

16. RCA argues that TRT's difficulties in Central America are not relevant to a decision on its application. We considered TRT's problems in this area both relevant and jurisdictional since a severely diminished market could threaten TRT's viability and, thus, its ability to provide services to the public. Moreover, RCA's argument is curiously inconsistent since the issue of increased competition is the very issue RCA would have us consider with respect to the effect TRT's expansion might have on it.

17. RCA further argues that the Commission's comparison of TRT's operating revenues with those of the three major carriers does not show that the carriers would remain unharmed by TRT's entry into the European market. The Commission, however, did not, as RCA contends, determine that "no harm" would result from TRT's entry [33] but rather that "the adverse effects on the other record carriers will be *de minimis* and will not impair their ability to continue to effectively and efficiently serve the public." [34] To judge the magnitude of the impact, if any, on the other carriers of TRT's entry into the U.S.-Italy and beyond market, the Commission compared the operating revenues of TRT and the major record carriers, clearly one reasonable way of weighing the relative impact TRT's operations might have on the existing carriers' revenues.[35]

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[32] *Notice of Inquiry* into the Policy to be followed in Future Authorization of Overseas Dataphone Service, released July 31, 1972, Docket No. 19558.

[33] RCA Petition, August 18, 1972, p. 8.

[34] 35 F.C.C. 2d at 958. This finding is consistent with the guidelines for determining the feasibility of competition set out in *Mackay Radio and Telegraph*, 28 F.C.C. 231 (1960), which requires that consideration be given to the effect new competition will have on the carriers presently providing service to the subject market.

[35] See fn. 22 supra.

18. With respect to RCA's argument that Commission consideration of TRT's application constituted "favored treatment" in light of its pending application for expanded gateway authority, it should be pointed out that TRT in its application was requesting to expand service from existing gateways whereas RCA's proposes to provide service from new gateways. Moreover, it should be noted that because of the policy issues involved in RCA's application as well as in applications for similar authority filed by other carriers, the Commission recently issued a Notice of Inquiry and Proposed Rule Making [36] to consider these issues and ordered that these applications be retained for further action in accordance with any decisions made as a result of this Inquiry. Thus, the Commission action taken with respect to TRT's application and its affirmation here does not prejudice full consideration of RCA's pending application and cannot properly be considered favored treatment.

19. With respect to the Court proceeding initiated by ITT Worldcom (footnote 4, *supra*), we note (1) that the Court order remanding the record to the Commission was issued on December 1, 1972; (2) that the remand order apparently left the next move to ITT to "advance its contentions and request for relief to the Commission"; and (3) that ITT to this date has filed no pleadings or other papers with the Commission with respect to its claim of unreasonable delay in acting on its proposal for modification of the International Formula.[37] In the meantime, in an action unrelated to the Court proceeding, the Commission on December 13, 1972, adopted a broad *Notice of Inquiry and Proposed Rule Making* (Docket No. 19660) on various aspects of the handling of international message traffic, including ITT's International Formula revision proposal. Although counsel for ITT have discussed with Commission staff members the matter of possible timetables for action on the Formula portion of the Inquiry, ITT has not placed in the record any "contentions or requests" which might be the subject of Commission action for record purposes.

20. Under the circumstances, and in light of the facts that there are no specific ITT requests or contentions before the Commission and that the Formula issue is now being actively treated in the context of a broader inquiry, we believe it is appropriate to return the record to the Court at this time, supplemented by this *Order*, which advises the Court of the current status of Commission action and of the Commission's rationale in disposing of Petitions for Reconsideration of the grant of the TRT applications. The remand came at the Commission's own motion, and we have an obligation to return the record within a

[36] *Notice of Inquiry and Proposed Rule Making*, released December 10, 1972, Docket No. 19660.

[37] ITT in 1964 proposed that the Commission modify the Formula. In its Petition to Deny the application of TRT that is the subject of the present proceedings, ITT argued, *inter alia*, that the Commission should not grant the TRT application without first revising the Formula, because grant of the application would aggravate the "inequities" it said were created by the Formula. The Commission rejected that argument in the *Order* by stating specifically that TRT was not to obtain "a quota under the International Formula. . . ." While the entry of TRT into the U.S.-Italy market may affect the amount of unrouted traffic, it will not have any effect upon the proportionate distribution of traffic among the carriers participating in the Formula. Under these circumstances, we do not regard the resolution of the Formula question relevant to the TRT application.

reasonable time so that the proceeding may go forward.[38] In doing so, however, we point out that the *Notice* in Docket No. 19660 is the beginning of agency action on the International Formula matter and that final action on that matter will be based in large part on data and comments received in the course of the Inquiry.[39]

21. Finally, on April 11, 1973, TRT filed a tariff revision to provide message and telex services between the United States and Israel, Jordon, Lebanon, Kuwait, Pakistan, the Philippines and Thailand to become effective May 11, 1973.[40] TRT proposes to serve these points via interconnection with ITALCABLE, using the satellite circuit authorized in our July 19, 1972 *Order*. RCA, WUI and ITT World Communications Inc. (ITT) each have filed petitions to reject TRT's proposed tariff, alleging that TRT's Section 214 authority to operate its direct U.S.-Italy circuit is limited to the provision of services to Italy and European points beyond. However, our *Order* authorizes TRT to provide services "between the United States and Italy and points beyond." It is long established precedent that a carrier authorized to provide service to "points beyond" may do so without securing prior specific Commission approval, provided that that carrier does so by transferring traffic to its foreign correspondent.

22. We have granted authority for such use of circuits routinely to all carriers for many years. The carriers have routinely used this authority and routed traffic to points for which they have had no authority to service via direct circuits. We do not believe that this practice is inconsistent with the standards set forth in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). That case concerned the question of standards to be applied to duplicate direct circuits. Nothing therein indicated the same standards are to apply to service to points via indirect means. While it is true that in our *Order* we used the rationale of the RCA case in analyzing the European market and found that the proposed indirect service met the strict standards of that case, we did not intend to indicate only indirect service meeting these standards would be authorized in the future. Consequently, in our authorization to TRT we granted it the same authority granted to other carriers to provide service by indirect means. Therefore, Petitions to Reject the tariffs of TRT shall herein be denied.

CONCLUSION

23. In light of the foregoing, the Commission is of the opinion that a hearing into the matters surrounding TRT's application is not necessary and is not warranted by the assertions and arguments brought forward by RCA and WUI in their petitions for reconsideration and, further, that the data upon which the Commission based its decision herein were clear definitive and accurate. Accordingly they provide a

[38] In its remand order, the Court directed the Commission to return the record "promptly" after it had been supplemented by the remand proceedings. Since that time, the Commission has received two inquiries from the clerk of the Court asking the status of the matter. We note also that ITT agrees that the record should be returned and has filed a motion with the Court to compel the Commission to return it.

[39] The Commission heard oral arguments on February 13, on one aspect of the *Inquiry*. On April 23, the Chief of the Common Carrier Bureau called a meeting of interested parties, including ITT, to discuss specific issues involved in the *Inquiry* and procedures for resolving them.

[40] The effective date was subsequently deferred until May 24, 1973.

sound basis to support the grant to TRT of one satellite circuit to Italy and points beyond served via the facilities of ITALCABLE.

24. However, there were some inadvertencies in our *Order* which we shall take this opportunity to correct. First, as is normal in these matters, we shall assert jurisdiction over all aspects of this case. Second, because TRT did not request authority for alternate voice/record services, that authority is being withdrawn. Therefore, pursuant to Section 1.106(k)(3) of the Commission's Rules and Regulations, our July 19, 1972 *Order* shall be modified to the extent set forth below. We shall herein cancel the original *Order* and substitute our Modified Order and Certificate, which remains essentially the same, save for the corrected inadvertent omissions and errors.

ORDER

Accordingly, IT IS ORDERED, that the petitions for reconsideration submitted by RCA Global Communications, Inc. and Western Union International, Inc. in the matter of the application of Tropical Radio Telegraph Company for one satellite voice circuit between the United States and Italy and points beyond ARE DENIED.

Further, IT IS ORDERED, that the Petitions to Reject TRT's proposed tariff submitted by RCA, WUI and ITT ARE DENIED.

Further, IT IS ORDERED, that the Order and Certificate contained in the Commission's Memorandum Opinion, Order, Authorization and Certificate, adopted July 12, 1972, released July 19, 1972, 35 F.C.C. 2d 950, at Page 960 IS CANCELLED and that the following IS SUBSTITUTED:

MODIFIED ORDER AND CERTIFICATE

IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require that TRT Telecommunications Corporation (TRT) acquire and operate the requested satellite voice circuit for use in providing its regularly authorized services to the public between the United States and Italy and points beyond.

IT IS ORDERED, that the application of TRT Telecommunications Corporation, File No. T–C–2335–1–A, as amended, IS GRANTED, to the extent set forth below, for a term commencing with the date of issuance of this Memorandum Opinion, Order, Authorization and Certificate and ending December 31, 1972; and

(A) TRT is authorized to

(1) acquire and operate one satellite voice circuit between an earth station in Etam, West Virginia and an appropriate satellite over the Atlantic Ocean to be interconnected with a similar circuit between the satellite and an earth station near Rome, Italy, furnished by ITALCABLE,

(2) acquire and operate connecting facilities between TRT's operating office in Ft. Lauderdale, Florida and an earth station in Etam, West Virginia,

(3) use the above authorized facilities to provide message telegraph, telex and other non-voice services between the United States and Italy and points beyond, and

(4) subdivide the voice circuit authorized herein in accordance with the Commission's Memorandum Opinion, Order and Authorization adopted October 9, 1968, *ITT World Communications Inc.*, 14 F.C.C. 2d 818;

(B) this authorization shall continue on a year-to-year basis commencing January 1, 1973, unless the Commission notifies the applicant to the contrary and requires the filing of a new application on or before December 1 of the then current authorization term;

(C) TRT shall seek specific authority to extend the above-authorized facilities beyond Italy by circuits in which TRT acquires any interest; however, TRT does not need to seek specific Commisison authority to handle communications destined to points beyond Italy provided such communications are handled via facilities in which TRT has no interest;

(D) TRT, shall not be entitled to a quota under the International Formula for unrouted outbound telegraph messages destined for the Atlantic area—Area A; TRT, of course, shall be entitled to receive from Western Union Telegraph Company outbound traffic specifically routed via TRT;

(E) TRT shall submit quarterly reports of traffic, revenues and costs associated with the service authorized herein for a period of one year; the first quarterly report will cover the period of August through October 1972; each report will be due no later than the fifteenth day of the month following the quaterly reporting period;

(F) the Petition to Deny of ITT Worldcom IS DENIED;

(G) the opposing comments of RCA, WUI and WU ARE DISMISSED; and

(H) jurisdiction is retained over all aspects of this matter specifically including, if necessary, the reallocation of circuits in the satellite system among the various carriers and other authorized users, if any, and from voice to record carriers, or record to voice carriers, and between record carriers, in order to insure that all present and future authorized carriers shall have nondiscriminatory use of and equitable access to the communications satellite system.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

ANNEX A.—CONSOLIDATED STATISTICS FOR U.S. INTERNATIONAL RECORD CARRIERS

		First half 1971	First half 1972
Outbound United States-Italy Telegraph	Messages	228,588	202,752
	Revenues	$451,831	$394,726
Inbound United States-Italy Telegraph	Messages	202,671	180,884
	Revenues	$322,661	$318,431
Outbound United States-Italy Telex	Messages	223,563	280,265
	Revenues	$773,971	$929,443
Inbound United States-Italy Telex	Messages	251,399	318,063
	Revenues	$816,801	$1,045,376

109-041—73——5

ANNEX B—NET CHANGE IN INDUSTRY-WIDE REVENUES (FIRST HALF 1971 VERSUS FIRST HALF 1972)

	Year	Telegram	Year	Telex
Outbound	1971	$451,831	1972	$929,443
	1972	394,726	1971	773,971
		57,105		155,472
Inbound	1971	322,661	1972	1,045,376
	1972	318,431	1971	816,801
		4,230		228,575
Combined change		−61,335		+384,047
Net change				$384,047
				−61,335
Increase				322,712

F.C.C. 73-547

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application WPRY RADIO BROADCASTERS, INC. For Renewal of License of Radio Station WPRY, Perry, Fla.	Docket No. 18885 File No. BR-2927

APPEARANCES

Thomas W. Fletcher, Esq., on behalf of WPRY Radio Broadcasters, Inc.; and *Charles W. Kelley, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted May 23, 1973; Released May 30, 1973)

COMMISSIONER JOHNSON FOR THE COMMISSION:

1. This case arose out of events occurring in 1969 during the period of the Democratic primary campaign for Mayor of Perry, Florida, and the replies of WPRY Radio Broadcasters, Inc., (WPRY) to a series of three letters from the Commission concerning events during that period. The Commission set the renewal application for hearing in an Order of Designation and Notice of Apparent Liability released June 24, 1970 (FCC 70-650). The issues designated by the Commission were: (1) whether the licensee was evasive, lacking in candor, or misrepresented facts in its correspondence with the Commission; (2) whether during the period July 2-8, 1969, the applicant violated Section 315 of the Communications Act of 1934, as amended [equal opportunities for legally qualified political candidates]; Section 73.112 [logging of programs] and 73.120(b), (c), or (d) [equal opportunities for legally qualified political candidates, non-discriminatory rates and practices, and maintenance of files with respect to requests for time by political candidates] of the Commission's Rules; or failed in its fairness doctrine obligations; (3) whether during the time Ira W. Brown [a one-third owner of WPRY and its General Manager] was a legally qualified candidate for Mayor of Perry, WPRY used its facilities for the private interest of one of its principals or to achieve a personal advantage for him rather than in the public interest; and ultimately (4) and (5) whether WPRY was qualified to remain a licensee and should have its license renewed. In the event the hearing record did not sustain a denial of renewal, a determination was to be made as to whether an order of forfeiture in the amount of $10,000 or some lesser sum should be issued.

2. Except for the subjects of the fairness doctrine and the maintenance of political files, which the Examiner resolved in favor of the

applicant (Initial Decision (I.D.) Conclusions paras. 12 and 13) without exception by the Broadcast Bureau, the Examiner's conclusions on the first three issues were adverse to the applicant. However, having found reasons to excuse the misconduct, the Examiner decided favorably to the applicant on issues 4 and 5. Nevertheless, he concluded that a sanction was appropriate and therefore granted a short-term renewal "to insure proper performance of responsibilities in the future and impress upon the licensee the seriousness of its violations" (I.D. Conclusions para. 22) and imposed a $5,000 forfeiture because "the licensee did willfully violate" Section 315 of the Act and Sections 73.112 and 73.120(b) and (c) of the Rules (I.D. Conclusions para. 23). After examination of the record and hearing oral argument, the Commission has decided to reverse the Examiner, to deny the renewal and to cancel the $5,000 forfeiture.

3. The Commission believes that the Examiner's basic findings of fact are essentially correct, and they are adopted except as modified in this opinion or in the rulings on exceptions.[1] In order to provide a frame of reference for our discussion, we will outline the events which are the basis for this decision.

4. Ira W. Brown, Abraham Lincoln Poppell, Edwin Jackson [2] and two other persons were qualified candidates [3] for nomination in the Democratic primary for Mayor of Perry, Florida, which was to take place on Tuesday, July 8, 1969. Success in the Democratic primary was tantamount to victory in the general election because there are few Republican voters in Perry.

5. Brown is a one-third owner of WPRY and from January 1963 through late July 1970 was General Manager of the station.[4] He was the only salesman during June and July 1969 and handled all political accounts. During June and July his voice was heard over WPRY in sign-off, sign-on and commercial announcements as well as on other occasions. Norman Barry Gross and Walter Allen Cox were co-managers of Poppell's campaign. Gross worked at WGKR, the other radio station in Perry, from June 1 to July 3, 1969. On June 25 he agreed to work for Poppell without pay.

THE EVENTS DURING THE CAMPAIGN

6. At a chance meeting between Brown and Poppell on the morning of June 30, 1969, Brown sought to sell Poppell and Poppell sought to buy time on WPRY for his campaign for Mayor. The meeting resulted in an appointment being made for 1:00 p.m. the same day at Station WPRY. Brown was not there at 1:00 p.m. and had not appeared by 1:55 when Poppell left. Poppell made no attempt to pur-

[1] In those instances where there were conflicts in testimony, the Commission accepts the Examiner's determination as to which testimony warrants credence because the Examiner observed the witnesses and was in a position to judge their credibility or accuracy of memory. Factors other than Brown's testimony have led the Commission to disagree with the Examiner's conclusion that Brown had no motive to conceal the running of his rebuttal ads on July 7. See para. 50, *infra*.

[2] Jackson figures in the findings only with respect to the question of the rates charged and payments made for political announcements. See paras. 21 and 34, *infra*.

[3] Each filed on or before June 5, 1969.

[4] Brown testified that while nothing is definite, he is considering returning to his role as General Manager, with the concurrence of the other stockholders, after the instant proceeding is "cleared up."

chase time from WPRY during this visit because he had been told to see Brown for this purpose.

7. Poppell later told Gross about Brown's failure to keep the 1:00 p.m. appointment on June 30. Gross advised Poppell that since Brown's voice on WPRY was familiar to the community, Poppell might possibly get "free, equal, comparable time" over WPRY. Poppell authorized Gross to get him such time if he could.

8. Gross and Cox with Poppell's authority sent a telegram to the Federal Communications Commission on July 3, 1969. The telegram was a "formal complaint" from Poppell that Brown had violated Section 315 by not keeping his appointment to sell Poppell time while at the same time Brown was conducting a "heavy commercial campaign" in his own behalf over WPRY and was also appearing on the air in a non-political capacity. The telegram asserted that Brown's voice was well known in the community and the primary was only 5 days away. The Commission's response, a copy of which was sent to and received by Brown on July 3 at WPRY, recited the allegations in the Poppell telegram and ended by stating "Commission advised by station that it will afford you equal opportunities upon request by you." An FCC representative had been assured by Brown over the telephone that he would afford Poppell equal time.

9. Having received the Commission's assurance that WPRY would afford Poppell equal time, Gross and Cox went to WPRY on July 4 to seek equal time on Poppell's behalf and at his specific request. They were prepared to request 51 minutes of free time for Poppell which was the total number of minutes Brown had been heard on WPRY on July 3, excluding political announcements.[5]

10. When they arrived at WPRY on July 4, Brown was not in; and when they inquired where he was, they were told that he was unavailable. If Poppell had tried personally, he would not have been able to get in touch with Brown during working hours on the 4th because no one at the station knew where he was. Gross and Cox said that they had come to get some time for Poppell. The program director offered to sell them time. Gross and Cox told him they believed that Poppell was entitled to free time and they asked for 51 minutes. Cox had brought with him and showed the program director that part of the Federal Register dated May 4, 1966 entitled "Use of Broadcast Facilities by Candidates for Public Office" with special reference to what constituted a "use" by a political candidate. Cox and Gross pointed to Brown's commercial announcements over the station as the "uses" to which they referred. The program director's initial reaction was that they were joking. When he realized they were serious, he called in WPRY's engineer and asked his opinion. The latter said he did not know what to do about the request, and he accused Gross and Cox of just trying to stir up trouble. Gross and Cox replied they were only trying to get what Poppell was entitled to have. The meeting ended with the program director telling Cox and Gross that he had no authority to give Poppell free time (which Brown later confirmed) and they would have to see Brown. There is no evidence that any other

[5] After qualifying as a candidate, Brown was heard from June 3 through July 8 for an average of 56.5 minutes a day in regular commercial announcements. (See Broadcast Bureau Ex. 11)

reason was given Gross and Cox for not complying with the request for free time.

11. At the July 4 visit to WPRY Gross and Cox had with them announcements prepared for use on Poppell's behalf and scripts of the tapes. Gross thought Poppell's voice appeared on one of the tapes; but Cox testified that Poppell's voice was not on any of the tapes brought to WPRY on July 4. The program director did not listen to the tape recordings and Gross was not sure whether the program director read the scripts for them.

12. Upon returning either late in the afternoon or late in the evening on July 4 from his customary July 4 visit to his brother's farm, Brown received a call from the program director relating that Cox and Gross had come into WPRY that day and asked for free time for Poppell. The program director said he had told them he was not authorized to give it to them. After being informed of the incident, Brown made no attempt to reach Poppell on the 4th to offer him free time or for any other purpose.

13. After his visit to WPRY on July 4, Gross went to WGKR. where he had been employed between June 1 and July 3, 1969. A disc jockey from WPRY telephoned WGKR and in a screaming, angry manner told Gross that he had better not return to WPRY and act as he did. The disc jockey did not say he would strike Gross if he returned to WPRY but said that if Gross knew what was good for him he'd better keep away from WPRY. Gross construed the remarks as a threat of bodily harm. Brown did not learn about the telephone threat till a later date in a letter from the Commission.

14. After the events of July 4, Poppell sent the Commission a second telegram early in the morning on July 5 which recited the failure of Gross and Cox to reach Brown and the lack of authorization of anyone at WPRY to afford equal time to Poppell's representatives and mentioned a threat of "bodily harm" made to one of those representatives.

15. Early in the afternoon on July 5, Brown sent Poppell a telegram informing him that he should appear in person at the studios of WPRY at 6:00 p.m. that day where he would be afforded his "equal opportunity under Section 315 FCC." [6] On the evening of July 5, Brown met with Poppell at WPRY and offered to sell him time. Poppell did not accept the offer. At Poppell's suggestion they arranged to meet the following morning—Sunday, July 6, 1969. There is no evidence that at the July 5 meeting Brown gave the format of the July 4 tapes as the reason for not offering free time.

16. On Sunday morning, Brown met with Poppell, Gross and Cox at WPRY at 10:00 a.m. Poppell, Gross and Cox brought with them two tapes with three tape-recorded spot announcements of 60 seconds each. Each announcement had an introductory statement by Poppell:

[6] Brown also sent to the Commission a telegram containing the substance of the telegram sent to Poppell (Broadcast Bureau Ex. 5). This action of Brown suggests to us that the Broadcast Bureau had by that time again communicated with Brown and that Brown was acting in response to that Commission inquiry. In a finding based on Broadcast Bureau Ex. 6, a telegram from the Broadcast Bureau to Brown and Poppell, the Examiner determined that Brown's telegraphic offer to Poppell was sent in response to another Commission inquiry (I.D. Findings of Fact para. 19). No exception was taken to that finding. The Broadcast Bureau at oral argument, however, stated that the record is not clear that the Commission had communicated with Brown on July 5 before he sent his telegram to Poppell.

"I am Abe Poppell, candidate for Mayor for the City of Perry." [7] The remainder of each announcement was in the voice of Gross or Cox. Brown listened to the tapes and made a copy of them. Each spot charged Brown with failing to pay a local tax. Brown, speaking alone to Poppell, told him the taxes had been paid but added that if Poppell insisted, the tapes would be run. Poppell offered to pay for running the spots and Brown refused saying Poppell was entitled to free time. Brown asked Poppell to make a new tape, but Poppell refused. There is no evidence that Brown expressed any objection to the format of the tapes on Sunday morning.

17. When the Sunday morning meeting ended, Brown had agreed to run the spots the next day, Monday, July 7, 1969, the day before election. Poppell asked that "the whole tape," meaning each spot, be run each hour during WPRY's entire broadcast day. Poppell admitted, however, that Brown may have misunderstood his request as to how many of the three spots would be run each hour. Brown thought Poppell wanted his spots to run one per hour for twelve hours. Later that same day Brown said he would not run the spots. Poppell testified that Brown said he would not run the spots because of their content and because they were not entirely in Poppell's voice. Brown denied having told Poppell the tapes would not be run. Cox testified Brown told him Sunday evening that he would not run the spots because of their content. Brown testified he did not remember making the call to Cox. The Examiner accepted Poppell's and Cox's testimony as to Brown's refusal to run the ads. (I.D. Findings of Fact par. 23 n. 8, Conclusions par. 1)

18. On July 7, Cox went to WPRY at about 8:45 a.m. to pick up the tapes, which Brown had told him the evening before would not be run. Brown asked Cox to sign a statement on behalf of Poppell and his two associates before taking the tapes. The statement was to the effect that Cox, Gross, and Poppell would drop all the charges they had made against Brown and WPRY. Cox refused to sign the statement. He then took the original tapes and left.

19. Twelve Poppell spots were broadcast over WPRY on July 7 (apparently from Brown's copy of the tapes). Each spot charged Brown had failed to pay a local tax. Each spot was followed immediately or within a few minutes by an announcement by Brown which said that the tax referred to in the Poppell spot was charged to a partner of Brown and had already been paid.

20. Only one rebuttal to the 12 Poppell spots was logged. Brown said he failed to log the other 11 rebuttals because he was preoccupied with other matters and forgot to make up a start order which was the key for getting the announcements in the log. Brown explained that after making the tape of his rebuttal to Poppell's charge, he ordered the station's disc jockeys to run the tape after each Poppell spot. Cox called Brown after the first broadcast of the rebuttal and complained of its adjacency to Poppell's spot. Brown called the FCC and understood

[7] This introductory statement in Poppell's voice was apparently the result of the Broadcast Bureau's telegram to Brown and Poppell (Broadcast Bureau Ex. 6, see note 6, *supra*) which advised Poppell that "candidate must personally appear and use all or part of the time to which he is entitled." This advice was given Poppell apparently because the Commission inquired of WPRY about the July 4 tapes and was advised that Poppell's voice was not on them.

that the rebuttal could be broadcast at any period after a Poppell spot.

21. In addition to WPRY's involvement in Poppell's quest for time under the equal opportunities provision of Section 315, WPRY also sold political time to Jackson, another candidate for the Democratic nomination for Mayor of Perry. Jackson was charged more than Brown charged himself for the ads he ran for himself between June 25 and July 8. Based on WPRY's standard rates, Brown should have been billed $147.10.[8] In fact Brown's only payment to WPRY was by a check for $120.00 signed by him and paid to the order of WPRY Radio, Incorporated, but drawn on the account of WPRY Radio, Inc. No change in the balance of WPRY Radio, Inc., bank account resulted. WPRY owed Brown over $200 in back salary at the time and Brown assumed his debt to WPRY could be deducted from the amount owed him; but his obligation to WPRY still had not been deducted at the time of the hearing.

RESPONSES TO THE COMMISSION'S INQUIRIES

22. On July 16, 1969, after the primary campaign was over, Gross wrote a letter of complaint to the Commission. In recounting events during the campaign, Gross alleged that after being denied equal time, he received a telephone call from a WPRY announcer threatening him with bodily harm. The Commission sent the letter to WPRY on August 7, 1969 for comment. In his response of August 19, the only comment Brown made concerning the allegation of a threat of bodily harm was that he didn't understand such a charge and that in his view neither he nor anyone on his staff would exercise bodily force on anyone. On the face of the response it was not apparent that Brown had made any investigation or inquiry of employees about the reported threat.

23. On September 24, 1969, the Commission wrote and specifically asked for a statement as to whether any employee did or did not threaten Gross with bodily harm and requested signed statements by each person employed at WPRY on the date of the alleged incident. Brown responded on October 9 that he had talked to his "d.j.'s" and that no bodily harm was threatened. Immediately following was a denial of a threat on July 4 which was signed by the program director, Brown, and an engineer. None of the persons submitting the joint statement was a disc jockey. In fact, Brown had not talked to any disc jockeys regarding the incident. Brown had the station logs and undoubtedly other station records available to him with respect to the identity of his employees on July 4, but he failed to make a complete response by not submitting their statements or explaining their unavailability.

24. The Commission again wrote Brown on December 24, 1969, pointing out the previous request for statements by each person employed by the station on the date of the incident and the fact that the logs of July 5, 6, and 7 showed the names of three persons whose statements were not submitted. The Commission asked for the signed statements of the latter three persons and the reason for

[8] The I.D. used the incorrect figure of $157.10.

failing to include their statements previously. On January 12, 1970, Brown responded that he had not enclosed the statements of the three named persons because he was not aware they were working at WPRY on July 4, 1969. He enclosed a signed statement of one of the three former employees. The statement denied the employee threatened bodily harm to Gross. The statement had been prepared by Brown and sent to the employee to sign. Brown said in his letter that he would try to locate the other two employees and ask them the same questions he'd asked his other employees concerning threatening Gross by phone or in person. Brown wrote the other two former employees and enclosed for the signature of each a statement of denial. Each signed the statement prepared by Brown; and Brown sent the signed statements to the Commission.

25. In addition to alleging the threat of bodily harm to himself, Gross in his letter of complaint also had related the June 30 episode and the events connected with the airing of Poppell's ads over WPRY. In his first letter Brown specifically denied he had an appointment with Poppell, specifically denied that anyone had been refused time on the station, generally denied all Gross's allegations, and stated that he had asked only for a receipt for the tapes returned to Cox on July 7. The rest of Brown's letter was a counterattack on Gross. Brown stated that Gross's accusation should have been made to him and not to the FCC. Finally, Brown asked that "the case be dropped as the election is over and Mr. Poppell has made no further complaint only the person supporting Mr. Poppell." [9]

26. Therefore, in its letter of September 24, in addition to making further inquiry about the alleged threat, the Commission also asked Brown about Gross's allegations with respect to Poppell's attempts to secure time and asked specific questions concerning the number, duration, and time of all political announcements aired over WPRY on Brown's behalf and concerning the broadcast of rebuttal announcements for Brown. Brown's reply on the number and duration of announcements on behalf of his candidacy differed from the facts developed in the hearing record. He reported 126 spots; the record showed 136 spots. The total number of seconds of political ads he reported in his letter was 2500; the record showed political spots for Brown totalling 4330 seconds. Brown's reply letter referred to the first Poppell ad, and said that this ad was followed by a one-minute musical interlude; that the Brown spot was the only spot run that close; that Brown's voice was nowhere near the Poppell tape; that Poppell received all the ads he asked for; that they were not tagged with political rebuttal; that his own spots were logged and paid for. The record disclosed that there were 12 rebuttal spots; three were run back to back with the Poppell spots; four were run with a one-minute lapse; one was run with a two-minute lapse; three were run with a three-minute lapse; the ads were not tagged as political ads; they were, with one exception, not logged and they were not paid for.

27. Not satisfied with Brown's second letter response, the Commission in its third letter asked about a 35-second tax receipt announce-

[9] The Examiner in his Findings did not detail Brown's response on these matters (I.D. Findings of Fact para. 45.) The substance of the replies is, however, implicit in paragraph of the Conclusions of the I.D. and supported by Broadcast Bureau Ex. 9.

ment, whether Brown had paid for the 35-second spots, whether they were in his voice and how they were logged, and also asked him to explain the discrepancy between the amounts charged for his spots and the amounts charged for other political spots. Brown in his response to the Commission's third letter said he knew of no 35-second announcement,[10] stated that all his political ads were in his voice and "were tagged as political announcement," and explained that $100 was used for 100 20-second spots and the remaining $20 of the $120 check was used for the balance of his commercials.

CONCLUSIONS

28. From these facts the Examiner concluded and we agree that WPRY was guilty of numerous instances of misrepresentation, evasion, and lack of candor (I.D. Conclusions paras. 1–4); that WPRY violated Commission Rules by the failure to log 11 out of 12 rebuttal announcements, by giving Brown lower rates than those charged Jackson, and by failing to require any payment of Brown even at the lower rate (I.D. Conclusions paras. 5 and 9–11);[11] and that the facilities of WPRY were used for the benefit of Brown rather than in the public interest (I.D. Conclusions para. 14).[12] We modify the Examiner's analysis of the facts as they relate to the denial of equal opportunity to Poppell in violation of Section 315 of the Act and Rule 73.120(b),[13] although we conclude that there was a violation of that section of the Act and the Rule.[14] We reject as unsound the grounds on which the Examiner mitigated the degree of WPRY's wrongdoing in all these matters in order to conclude that the applicant was qualified to remain a licensee.

THE APPLICANT'S RESPONSES TO THE COMMISSION

29. WPRY's letter responses of August 19 and October 9, 1969 and January 12, 1970 were in parts evasive, lacking in candor, or misrepresented facts. WPRY's response of August 19 to the Commission's first letter was untrue in denying that Brown had made an appointment with Poppell to arrange for a sale of political time. It was untrue in stating that Brown had not refused Poppell political time. The August 19 letter was lacking in candor in failing to reveal that Brown had asked Poppell's representative to sign a statement that Poppell and his associates would drop all charges lodged with the Commission. Instead Brown stated only that he had requested a receipt for the return of the tapes to Poppell. Brown's response to the inquiry on the complaint of the threat of bodily harm evidenced evasiveness. The

[10] In testimony Brown said the tax receipt announcement was a 30-second commercial. But in his earlier letter of October 9, 1969, he had listed only 20, 40, and 60-second ads. At the end of the October 9 letter he had referred to a "30 to 45 second [tax receipt] tape" which was run "as logged" on July 7.

[11] The Examiner does not seem to have concluded specifically that the violations of the Commission's Rules prohibiting discrimination in rates and charges constitute denial of "equal opportunities" and therefore violations of Section 315 of the Act. The Commission specifically draws this conclusion. See para. 34, *infra*.

[12] Unlike the Examiner, the Commission reaches no conclusions with respect to the question of censorship or attempted censorship because the record supports denial of renewal for other reasons.

[13] The Commission is uncertain how many violations of Section 315 the Examiner found (see I.D. Conclusions paras. 7, 15, 21, and 23).

[14] See n. 12, *supra*.

statement that neither Brown nor anyone on his staff would exercise bodily force against anyone was made without asking some of his employees if any such threat had been made. Brown was evasive when he completely failed to respond to the charge that he had run several political announcements in his own voice on July 7, without disclaimer and in rebuttal to Poppell's announcements.[15]

30. WPRY excepts to the conclusions of untruth as to Brown's denial of the appointment with Poppell, of untruth as to the refusal of time to Poppell, and of lack of candor with respect to the receipt for the tapes. These exceptions are denied. As to Brown's denial of an appointment, he himself testified that at the chance meeting on June 30 when the purchase of time was brought up, he said he would be at the station about one o'clock that day and that Poppell replied he would be there. (Tr. 134) In addition, in response to questioning by the Examiner, Brown testified that he expected Poppell to come to the station on June 30; that Poppell could have waited "20 to 30 minutes or even an hour range"; and that he expected Poppell "anywhere from between 1:00 o'clock and 2:00 o'clock." (Tr. 412) The record also supports the conclusion that Brown was untruthful in stating that he had not refused Poppell time. Brown was responding to an allegation by Gross that on Sunday afternoon, July 6, Brown had told Poppell that the tapes that had been submitted would not be run. The Examiner accepted Poppell's testimony that Brown at this time refused to run Poppell's political spots because of their content and because they were not entirely in Poppell's voice. The record also supports the conclusion that Brown lacked candor in failing to reveal that he had requested Cox to sign a statement that all charges before the FCC would be dropped. Cox's testimony was specific that Brown "requested that I sign a statement on behalf of myself, Mr. Poppell and Mr. Gross stating that we would drop all charges" and that when Brown made the request he said "Get me off the hook." (Tr. 300–301) The Examiner stated that his "observations of Cox's conduct and demeanor on the stand resulted in the firm impression that he was a credible witness." (I.D. Findings of Fact par. 23 n. 8).

31. WPRY's response of October 9 to the Commission's second letter also lacked candor and contained misrepresentations. The letter misrepresented the number and duration of political spots run for Brown on WPRY and the logs enclosed with the letter showed only 1 out of 12 Brown spots broadcast on July 7. The letter was lacking in candor when Brown stated Poppell had received all the ads he asked for when the evidence shows Poppell sought 51 minutes on July 4 and got 12 minutes on July 7. The October 9 letter denied any of Brown's spots were run near Poppell's when a stipulation shows that they ran next to or close to each of Poppell's political announcements. The letter falsely claimed there was a one-minute musical interlude between Poppell's first 60-second spot and Brown's only logged rebuttal. The October 9 letter denied that Poppell's spots were tagged with political rebuttal whereas the record establishes that Brown's announcement was designed as rebuttal and was broadcast close to Poppell's spots.

[15] WPRY does not except to the conclusions of evasiveness with respect to the alleged threat and Brown's rebuttal announcements.

The letter falsely stated that Brown's rebuttal was logged when in fact 11 out of 12 were not logged. The letter falsely stated that Brown had discussed the threat against Gross with WPRY's disc jockeys when in fact he had not done so. The letter was misleading in that only the signed statement of Brown, the program director, and the chief engineer denying a threat to Gross was included when there were three other employees on July 4 and the licensee had been asked to submit a statement from each employee of the station on the date of the alleged incident.[16] WPRY has excepted only to the conclusion of Brown's lack of candor in saying that Poppell received all the ads he wanted. WPRY argues that this is contrary to the conclusion that Brown misunderstood the number of times the ads were to be run on July 7. The conclusion of lack of candor, however, clearly goes to Brown's failure to admit that Poppell had sought "more time and at an earlier date," namely the 51 minutes sought on July 4.

32. WPRY's response of January 12, 1970 to the Commission's third letter contained evasive and false statements. Asked why he billed himself $120.00 for political spots apparently costing more, Brown failed to explain that he pro-rated the charges to himself for certain announcements even though there is no evidence he had ever pro-rated them for a customer of WPRY. Brown falsely stated again that he had not broadcast any spots in rebuttal to Poppell's announcements.[17] Brown's statement that he did not know three named individuals were employed at WPRY on July 4, 1969 is plausible because Brown may not have recalled the fact; but because he had access to employee records and logs, such lack of awareness displayed an attitude in responding to Commission inquiries that is tantamount to lack of candor. The January 12 letter also falsely stated that Brown paid $120 for spots when in fact he had drawn a check on the WPRY account for this purpose. The letter lacked candor in asserting that Brown would ask former employees "the same questions asked the other employees concerning threatening" Gross when in fact no questions were asked WPRY employees and Brown sent only statements of denial for them to sign.[18] The only exception to these conclusions with respect to the third letter from WPRY, dated January 12, 1970, is that Brown's statement that he had paid for his ads was false. This exception must be denied. As a businessman, Brown knew that the $120.00 check made out to WPRY on June 25, 1969, and drawn on the WPRY account effected no change in the WPRY balance. Brown's asserted anticipation of setting off his debt to WPRY by deducting the amount due from his uncancelled salary checks had still not been realized on January 12, 1970.

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[16] WPRY does not except to the conclusion of misrepresentation of the number and duration of spots, the false claim of the one-minute musical interlude, the false statement that he had talked to his disc jockeys, the false claim that his tax rebuttal announcements were logged or the misleading nature of Brown's inclusion of a statement from three persons working at the station but not including the statements of three others.

[17] Brown's January 12 reply on this point is unclear. However, WPRY has not excepted to the interpretation and conclusion that Brown again falsely stated he had not broadcast any rebuttals to Poppell's ads.

[18] WPRY does not except to the conclusion that the lack of awareness of who his employees were on July 4 shows an attitude that is tantamount to lack of candor, nor does WPRY except to the conclusion that Brown's statement that he would ask the two remaining disc jockeys the same questions as those asked other employees was lacking in candor. (The Examiner erroneously named three rather than two former disc jockeys to whom Brown referred.)

THE VIOLATIONS OF SECTION 315 OF THE COMMUNICATIONS ACT AND SECTIONS 73.112 AND 73.120 (b) AND (c) OF THE COMMISSION'S RULES

33. WPRY violated Section 73.112(a)(4)(ii) of the Rules, which provides for logging the name and affiliation of the candidate for each political announcement, by failing to log 11 out of 12 rebuttal announcements for Brown on July 7.

34. WPRY was also guilty of two separate violations of Section 73.120(c) and of Section 315(a) when it (1) charged Brown a lower rate for political ads than it charged candidate Jackson and then (2) did not require Brown to pay for his ads. WPRY's argument that there was no discrimination against Jackson until Poppell was given free time and then Jackson's money was refunded,[19] is patently unreasonable. The first discriminatory action occurred when Brown charged himself a lower rate than he charged Jackson. If Jackson asked merely to buy time, then WPRY was obligated only to sell time, and WPRY's affording Poppell free time at his request is in these circumstances an unrelated transaction. The second violation occurred when WPRY did not require payment from Brown even at the lower rate charged him. Brown's check written to WPRY on a WPRY account effected no change in the WPRY bank balance. These actions of WPRY were distinct and independent of each other.

35. WPRY also violated Section 315 of the Communications Act and Section 73.120(b) of the Commission's rules, which incorporates the equal opportunities provision of Section 315, by denying Poppell the 51 minutes he requested on July 4 through his representatives, Gross and Cox. Brown had regularly made commercial announcements during the course of his candidacy for an average of 56.5 minutes a day and his voice was well known in the community. Brown's voice in these commercial non-political announcements broadcast over WPRY constituted a "use" of WPRY by Brown under Sec. 315 of the Act.[20] Therefore Poppell and all other candidates campaigning in the Democratic primary for Mayor of Perry were entitled to receive comparable time at no cost upon their request.[21]

36. On July 3, 1969, Brown was heard in commercial announcements for 50–51 minutes. On the basis of these announcements, Gross and Cox at Poppell's request went to WPRY on July 4 to get him comparable free time. They had with them tapes which did not include Poppell's voice. At WPRY Gross and Cox were refused free time because no one there had authority to give free time and Brown, who had the authority, was not there and could not be reached although the day before Brown had assured the Commission that he would afford Poppell time.

37. WPRY argues that the request on July 4 was not valid and therefore there was no violation of Section 315 at that time. WPRY

[19] Jackson's money for the 1969 ads was refunded in March 1971 nine days prior to commencement of the hearing.

[20] *Letters to Station KUGN*, 40 FCC 293 (1958); *Georgia Association of Broadcasters*; 40 FCC 343 (1962); *Elliot C. Lovett in re Station KTTV–TV*, 40 FCC 282 (1957); *Letter to Kenneth Spengler in re Station WCVS*, 40 FCC 279 (1956); In re *Station WBAX*, 17 FCC 2d 316 (April 16, 1969); see *Lincoln Broadcasting Company* (*WMAY*), 4 RR 2d 849 (1965).

[21] The candidate requesting equal time would have to observe the requirements of Section 73.120(e) of the Commission's rule (the seven-day rule) with respect to the time within which the rights must be asserted.

asserts that the request was made by Poppell's representatives rather than Poppell and the tapes they had with them did not include Poppell's voice. The Commission cannot sanction WPRY's resort to these arguments in these circumstances. Neither of these reasons was raised by anyone at WPRY at the time of the request. Had these reasons been given, Poppell could have confirmed that Gross and Cox were making the request with his authority; and there would have been an opportunity at that time to remedy any deficiency in the format of the tapes. In addition, however, it is plain that had Poppell appeared personnally at WPRY with tapes entirely in his own voice, no one at the station could have given him free time.[22] Despite Brown's assurance to the Commission on July 3, he left no one with authority in his absence to act on a Section 315 request even though the election was on July 8. Brown's absence on July 4 effectively precluded any possibility of a grant of Poppell's request and made a sham of Brown's assurance to the Commission that WPRY would afford equal opportunities upon Poppell's request.

38. A licensee cannot evade the affirmative obligation imposed by Section 315 by having no one available to act in the licensee's behalf. The statutory obligation to afford equal opportunity for political candidates is a singular requirement with respect to the use of broadcast facilities. This in itself denotes the seriousness of the duty to provide equal opportunities. The obligation is not to be taken casually. Brown had assured the Commission he would afford equal time and then made no provision for compliance on July 4. As the Examiner pointed out, there was not even a direct refusal of time but only the truthful statement of an employee that he was not empowered to act. The effect, however, was the same.

39. Questions as to the validity of a request for equal opportunities must be raised by the licensee at the time the licensee responds to the request. Refusals to comply must be accompanied by reasons so that there will be an opportunity to correct any deficiency in the request, if possible. Because the statute puts an affirmative obligation on the licensee, WPRY thus cannot by belatedly challenging the validity of the request escape the consequences of its delinquency in having no one authorized to act on the request for equivalent broadcast time.

40. Nor did Brown promptly remedy the failure of July 4 upon learning of the request for time. Brown returned to Perry late in the afternoon or late in the evening of July 4 and was informed by the program director of the request for time. Brown did not then try to communicate with Poppell. Nor did he try to reach Poppell promptly on July 5. He sent Poppell a telegram in the early afternoon of July 5 when the day was more than half over. In that telegram Brown informed Poppell that he should appear at 6:00 p.m. in person and he would be afforded "equal opportunity." Sometime on July 5 the Commission had made another inquiry to the station, in response to a second complaint telegram from Poppell received by the Commission on the morning of July 5 and had been advised that the offer of equal opportunity was outstanding.[23] But when Poppell went to the station,

[22] It is unnecessary, therefore, for the Commission to pass on the format of the July 4 tapes, and the Commission does not do so.
[23] See n. 6, *supra*.

Brown offered to sell time, not to give free time. Brown testified that he believed the first time he offered Poppell free time was Sunday, July 6 (Tr. 149). Questioned about the substance of the July 5 meeting, Brown testified plainly that he talked of the purchase or sale of time. (Tr. 338–339). Later in response to questions by the Examiner, Brown claimed that he offered Poppell free time at this meeting (Tr. 375). Still later Brown said he offered Poppell time "free or otherwise" (Tr. 380). The Examiner concluded that Brown's testimony at Tr. 338–339 "unequivocally" indicated he did not offer free time on July 5 (I.D. Findings of Fact para. 20 n. 7). Again, the question of the tapes' not including Poppell's voice was apparently not raised as a reason for not offering free time. Thus, considering the compressed period in which any compliance was possible, Brown's offer on July 5 was not only dilatory but continued to flout the obligation under Section 315.

41. With only four days remaining for the campaign Brown succeeded in letting the clock run for two of those days (July 4 and 5) without giving Poppell equal time. At the meeting on the morning of July 6 Brown offered Poppell free time with the ads to be run on July 7. At this meeting Brown listened to the taped ads, which now included Poppell's voice[24] in an introductory sentence identifying himself as a candidate with the rest of each ad in the voice of Cox or Gross. The format of the ads was not questioned at that time. Later on the 6th, however, Brown refused to run the ads because, Poppell testified, they were not entirely in Poppell's voice and they contained the tax delinquency charge against Brown. The Examiner accepted Poppell's testimony as to Brown's refusal to run the ads. But Brown denied that he told Poppell the tapes would not be run. If Brown did give the format as a reason for not running the tapes,[25] he apparently did not believe it to be a sound reason for refusal or he would not have denied that he told Poppell the ads would not be run. Moreover, in his reply letters to the Commission with respect to these events, Brown never contended that because he had expressed to Poppell a reasonable doubt about the format of the tapes, WPRY did not have to accede to the request for time.

42. On July 7 the day before election, Brown ran Poppell's ads, but only one an hour for 12 hours instead of three an hour for the broadcast day as Poppell intended.[26] Poppell admits that Brown could have misunderstood what Poppell meant at the morning meeting on July 6 as to the number of times the ads were to be aired. Brown's misunderstanding of that conversation does not, however, absolve him of the failure to give comparable time. The July 4 request was clear and was based on Brown's regular commercial announcements. Brown's telegraphic offer to Poppell was for "equal opportunity." Brown also knew that Poppell had complained to the Commission because he had been denied "equal comparable" time. In addition, the regular commercial announcements in Brown's voice continued during the days that Poppell was trying to get free time—47 minutes on July 4, 36

[24] See n. 7, *supra*.
[25] The Examiner made no specific finding that Brown gave Poppell this reason for not running the ads.
[26] WPRY broadcast for a minimum of 17 hours a day (Renewal Application). We note that three one-minute ads an hour for 17 hours would have been 51 minutes.

minutes on July 5, 30 minutes on July 6, and 42 minutes on July 7.[27] Under these circumstances the airing of Poppell's ads for only 12 minutes, less than one-fourth the time requested on July 4, does not constitute compliance with Section 315 and Rule 73.120(b). Moreover, Brown's own temporizing left him in the position where there was in effect no chance for him to comply by correcting the misunderstanding.

43. WPRY's failure to notify other candidates of Brown's use of the station did not constitute a violation of Section 315. Contrary to the Examiner's conclusion, Section 315 imposes no obligation on a licensee to notify other candidates of the "use" of the station by a candidate. We think it pertinent, however, that the Commission's rules impose an obligation of notification when a licensee airs political editorials supporting or attacking a candidate. 47 CFR § 73.123. If editorial support of a candidate requires notification, then, a *fortiori*, use of a station by an owner to promote his *own* candidacy requires notification because of the "special obligation" which the Commission imposes on an owner-candidate when dealing with other candidates.[28] *See Emerson Stone, Jr.*, 40 FCC 385 (1964). Brown's use of WPRY without notifying other candidates was taking advantage of his ownership of the station to promote his own candidacy.

44. The airing of Brown's rebuttals after Poppell's ads did not constitute a violation of Section 315 and Rule 73.120(b). The rebuttals did, however, reflect on the licensee's fairness in dealing with Poppell and, like the matter of failure to notify other candidates of Brown's use of the facilities, demonstrate the licensee's favoring of Brown rather than serving the public interest.

USE OF WPRY'S FACILITIES TO ADVANCE BROWN'S CAMPAIGN

45. The Commission also concludes that while Brown was a legally qualified candidate for the Democratic nomination for Mayor of Perry WPRY's facilities were used to achieve a personal advantage for him rather than to serve the public interest. The evidence of the advantage enjoyed by Brown is found in the denial of equal time to Poppell, the discrimination in rates charged Jackson, the failure of Brown to pay even at the lower rate he charged himself, the failure to notify other candidates of Brown's use of the station for his campaign, and also the placement of his rebuttals.

46. In sum, the record shows that WPRY was guilty of (1) misrepresentation, evasion, and lack of candor in its three letters to the Commission; (2) three violations of Section 315 of the Act, a violation of Section 73.120(b) of the Commission's Rules by failing to give Poppell equal opportunities, two violations of Section 73.120(c) by giving Brown advantages in rates and charges, and violations of Section 73.112(a) of the Rules by failing on July 7 to log 11 of 12 rebuttals; and (3) permitting the use of its facilities to favor Brown, one of its principals, rather than to serve the public interest.

47. The Examiner set out several factors which he believed mitigated the guilt of WPRY and concluded that WPRY was qualified to

[27] Broadcast Bureau Ex. 11.

[28] No issue of violation of Rule 73.123 was included in the designation order; the Commission, therefore, refrains from deciding whether Rule 73.123 was violated.

remain a licensee and that a short-term renewal would serve as an adequate sanction for the licensee's failure to meet "the high standard of performance expected of a licensee." The Examiner made no express finding that the applicant met the standard required by Section 309(a) of the Communications Act that on this record grant of the application for renewal would be in the public interest, convenience, and necessity.

48. In our view, the Examiner relied upon insufficient grounds to conclude that WPRY was qualified to remain a licensee. He noted that Poppell was represented by an employee of another local radio station (Gross) and that Poppell was seeking to broadcast a tax delinquency charge against Brown which Brown believed to be untrue. Although the employees of WPRY and Brown could reasonably have been mistaken as to Gross's connection with the other station on July 4 (because Gross had worked at the other station from June 1 to July 3, 1969), Gross's association with the other station is immaterial to WPRY's Section 315 obligation.[29] See *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1044 (affirmed *per curiam sub nom. Mapoles* v. *FCC*, No. 72–1583, D.C. Cir., January 30, 1973).

49. The Examiner's reliance on Brown's belief in the falsity of the Poppell ad charging Brown with tax delinquency emphasizes the licensee-candidate conflict which Brown faced on July 6 after he said he would run Poppell's ads and is probably the most appealing of the considerations the Examiner used to support his conclusion. The substance of Poppell's ads explains Brown's subsequent refusal on July 6 to run Poppell's ads and the running of his own rebuttals to counteract the charge. Moreover, Brown understood from a telephone conversation with a Commission official that the rebuttal could be aired. But these considerations do not touch Brown's conduct over all in denying Poppell equal time, discriminating in rates and charges, and failing to log the rebuttals; nor do these considerations diminish the guilt in the untruthful, evasive and uncandid replies to the Commission concerning the events during the campaign.[30]

50. The Examiner also concluded that because the first rebuttal spot was logged, there was no motive of concealment or deliberate omission by Brown in not logging the 11 other rebuttal spots. The Examiner found no reason to question Brown's explanation that the logging omission resulted from preoccupation with other matters and his failure to make up a start order. The record evidence weighs heavily against this conclusion. After the first rebuttal was run, Cox complained to Brown. Brown knew, therefore, that the rebuttal was objectionable to Poppell's representative, and Brown thus had reason not to prepare a start order to log the other rebuttals. In addition, Brown in his third letter [31] explained that a start order included the number of announcements per day. This leaves unanswered the question of why the only start order prepared by Brown (for the first rebuttal) did not cover the other airings of his ads.

51. Contrary to the Examiner, the Commission finds no grounds for excusing the instances of misrepresentation, evasion and lack of

[29] Similarly, the fact that Poppell's campaign was "anti-Brown" is immaterial to WPRY's obligations.
[30] See paras. 29–32 *supra*.
[31] Broadcast Bureau Ex. 34.

candor in replying to the Commission's inquiries on the threat to Gross. The Examiner reasoned that there was no evidence to support the alleged threat of bodily harm,[32] that the allegation of the threat was never believed by Brown, and that he therefore treated the Commission's inquiries on the subject too casually as evidenced by the untruthful statements he made (I.D. Conclusions paras. 3 and 20). Brown had no basis for believing or disbelieving the truth of Gross's charge until he had at least talked with or received a statement from each of the persons employed on July 4. Yet his first letter to the Commission avoided answering the charge. His second response falsely stated that he had discussed the threat with his disc jockeys, and was misleading because he then submitted a statement by three persons (himself, the program director, and an engineer) denying the threat. He submitted no statement from any disc jockey, or any explanation of their unavailability, even though the Commission had requested statements from each person employed at the time of the incident and the joint statement clearly referred to the date of the alleged incident. His third letter lacked candor because he said he would ask former disc jockeys the same questions he had asked the other employees when in fact he never asked other WPRY employees any questions and he sent two former disc jockeys only a prepared denial of the threat.[33]

52. The gravity of the misconduct in answering the Commission's inquiries on the alleged threat is independent of whether the licensee took the inquiry casually or seriously or whether the outcome of the hearing on the question was favorable or unfavorable to the licensee.[34] Rather than treating such a Commission inquiry casually, a licensee responsibly exercising its stewardship would have made every effort to assure itself of the facts when an allegation was made that a person was threatened with bodily harm after he attempted to exercise a candidate's right under Section 315.

53. The Examiner also excused the licensee's misconduct during the campaign upon the grounds that Section 315 is a specialized area of law, difficult to interpret; that the Section 315 "and related violations" took place within a relatively short period of the license term and primarily within the closing days of the primary campaign; that Brown was not well versed in the law and acted without counsel during the campaign and in responding to the Commission's letters;[35] that the running of Poppell's ads indicated a desire on Brown's part to comply once he knew what was required; and that despite his improper attitude in responding to the Commission's inquiries, Brown was not generally uncooperative with the Commission. We do not agree.

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[32] See n. 34, *infra*.

[33] WPRY has not excepted to any of these conclusions (I.D. Conclusions paras. 1–3) as to the nature of its replies with respect to the alleged threat.

[34] Whether the telephone call was in fact a threat of bodily harm is not decisionally significant, and we make no finding with respect to it. Gross could not remember the caller's exact words but was sure that the caller did not say he would strike Gross. In a screaming, angry manner, the caller said, among other remarks, something to the effect that Gross had better not come back over here [to WPRY] if he knew what was good or that if Gross knew what was good for him he'd better keep away [from WPRY]. (Tr. 257–260). We believe these remarks are ambiguous, but in their context could reasonably have been interpreted by Gross at the time as a threat of bodily harm should he return to WPRY.

[35] Copies of all Commission letters were sent to a Washington communications law firm, and a copy of WPRY's first answer was sent to the same firm. Other counsel, however, represented WPRY at the time of hearing and subsequently.

54. The Section 315 violation on July 4 resulted not from a misinterpretation of the law but from a total failure of WPRY to make provisions to honor its July 3 assurance to the Commission that Poppell would be afforded time upon his request.[36] This was a blatant disregard of a licensee's duty. The very fact that these events took place within the closing days of the primary campaign imposed upon the licensee the need to act expeditiously to meet its obligations. Nor can the Commission excuse WPRY's misconduct because Brown acted without counsel. A licensee is required to be familiar with the Commission's rules and regulations applicable to the service in which it is licensed, or to seek counsel when necessary. If failure to consult counsel exculpates a licensee for non-compliance with Section 315, the Commission would be deprived of effective authority in implementing the legislation. Moreover, the fact that violations of Section 315 occurred is not the heart of this case. Brown was taking advantage of his ownership of the station to benefit his own candidacy without giving other candidates the same opportunities, even upon request. His conduct during this time was plainly not in the public interest. WPRY did not attempt to enlarge the issues to show that the licensee's service to the public during the rest of its license term was such as to outweigh Brown's conduct during the campaign.

55. With respect to the letters sent by the Commission to WPRY and answered by Brown, all the matters raised in all three letters were within Brown's knowledge, could have been ascertained by referring to station records or, with respect to the threat, by asking the persons employed by the station on July 4.

56. In view of the specificity of Gross's allegations which were supplied to Brown with the Commission's first letter, the latter's response was on its face inadequate and required a second letter from the Commission on September 24 asking him for detailed information with respect to matters not answered in the first reply. The unsatisfactory second answer required a third letter on December 24, again asking detailed questions arising from the previous replies. Brown had ample opportunity, therefore, to seek expert advice in responding to the Commission's "lengthy and detailed" inquiries if he felt the need for it. As the Commission said in *Milton Broadcasting Co., supra*, at 1047: "The obligation was upon [the applicant] to take affirmative steps to ascertain the true facts and to supply accurate information to the Commission. His utter failure to employ even minimal precautions to insure that false representations were not made to the Commission would alone raise a substantial question as to whether [he] possesses those qualifications which are essential to favorable action on his renewal application." If failure to seek advice would exculpate a licensee or excuse his misrepresentations, evasions, and lack of candor in the circumstances of this case, then the Commission would be effectively precluded from protecting the public interest. Moreover, the Examiner concluded that except for the responses with respect to the threat, there was no excuse for the other untruths in Brown's responses (I.D. Conclusions para. 21).

[36] Similarly, the prohibition on discrimination in rates and charges required no interpretation.

57. Unlike the Examiner, we do not interpret Brown's conduct between July 4 and 8 as a "desire" to comply with Section 315. We believe that at most Brown made a reluctant effort at compliance. After repeated communications from the Commission, Brown finally gave Poppell some radio time. Brown answered the Commission's letters reasonably promptly and sent requested material promptly and was to that extent cooperative; but much of the information he supplied in his letters did not present a candid or full account of the subjects of inquiry, and Brown certainly could not be said to have been "cooperative" initially in trying to help the Commisison ascertain the truth as to the alleged threat.

58. Although the Bureau had the burden of initially presenting evidence on issues 1–3, the applicant had the burden of proof on those issues and of establishing under issues 4 and 5 that it possesses the necessary qualifications to remain a licensee of the Commission and that a grant of its application would serve the public interest, convenience, and necessity. We have held that the Bureau cannot be made to bear the burden of proving beyond any degree of "nagging uncertainty" that a renewal application should be denied. The statutory standard places the burden on the applicant to establish that the renewal will serve the public interest, and failure to place that burden on the applicant would be serious error. *Milton Broadcasting Co., supra*, at 1043. The Commission cannot conclude on this record that WPRY has sustained its burden, especially in light of the licensee's lax attitude in replying truthfully and candidly to the Commission's repeated inquiries.

59. Accordingly, IT IS ORDERED, That the application for renewal of license of WPRY Radio Broadcasters, Inc. for standard broadcast Station WPRY, Perry, Florida, IS DENIED;

60. IT IS FURTHER ORDERED, That the forfeiture of $5,000 imposed by the Examiner IS CANCELLED; and

61. IT IS FURTHER ORDERED, That WPRY Radio Broadcasters, Inc. IS AUTHORIZED to continue to operate the station until 12:01 a.m. on July 1, 1973 to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks judicial review of this Decision, it is authorized to continue to operate station WPRY until thirty (30) days after the judgment of the Court of Appeals.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Rulings on Exceptions of WPRY Radio Broadcasters, Inc.

Exception No.	*Ruling*
1	*Denied.* The substance of the exception to the failure to include a finding that Brown's employment was terminated is implicit in the finding that Brown is considering returning to his role as General Manager. Moreover, that Brown ceased to be General Manager after the application was designated for hearing is not decisionally significant. Brown also testified that he was considering returning to his employment as General Manager with the concurrence of other shareholders as soon as the instant proceeding was "cleared up."
2	*Granted.* The findings in para. 7 of the Initial Decision with respect to Brown's prior political ventures and their outcome are irrelevant.
3(a)	*Denied.* That Brown and Poppell had met after they qualified as candidates for Mayor but before June 30, 1969, and there is no evidence that Poppell then sought time over WPRY is decisionally insignificant.
(b)	*Denied.* That Brown asked to sell Poppell time on June 30, 1969, at the happenstance meeting rather than Poppell asking to buy time is decisionally insignificant. The second requested sentence, that the first time Poppell sought to purchase time was on July 5, distorts the record. Poppell went to WPRY on June 30 to purchase time and his representatives went on July 4 to seek free time.
(c)	*Denied.* See para. 30 of this decision with respect to the conclusion that Brown made an appointment with Poppell for 1:00 p.m. on June 30, 1969.
4	*Denied.* We read paragraphs 8, 9, and 10 of the findings of fact in the Initial Decision as establishing that Poppell advised Gross of the failure of Brown to keep his appointment some time after June 30 and not on June 25 when Poppell met Gross and Gross agreed to work for him.
5	*Denied.* It is clear from the findings that Poppell was not present with Gross and Cox at the July 4, 1969, visit. It is irrelevant whether Brown refused Poppell time prior to July 4.
6	*Denied.* Whether Cox engaged in any other campaign activities for Poppell is decisionally insignificant.
7	*Denied.* It is decisionally insignificant that Brown was at the station on July 3, 1969, and did not receive any requests for political time and that Cox did not know whether Brown was at the station on July 4 and did not call for an appointment.
8	*Denied.* That Brown did not know Poppell had representatives at the time of the July 4, 1969, visit is decisionally insignificant.
9	*Denied.* The telegram of July 5, 1969 (Broadcast Bureau Ex. 4) was prepared by Cox and Gross for Poppell and signed by him. The telegram refers to the "second time" Poppell was refused time and the refusal of time to his representatives. The Commission reads this in context as meaning two separate events which Poppell charged were violations of Section 315: Brown's failure to keep the appointment with Poppell to sell time on June 30, 1969 (which was the subject of Poppell's first telegram) and the denial of time to him when Gross and Cox went as his representatives to WPRY on July 4, 1969. Poppell's testimony that he was personally denied time was referring to an occasion different from the time Cox and Gross went alone for him and were refused (Tr. 190).

Rulings on Exceptions of WPRY Radio Broadcasters, Inc.—Continued

Exception No.	*Ruling*
10	*Denied.* The Examiner observed Brown, heard Brown's conflicting testimony, and determined that Brown in his earlier testimony (at Tr. 338–339) "unequivocally" indicated that Brown at the July 5 meeting was only offering to sell time. (I.D. Findings of Fact, para. 20 n. 7). See also para. 40 of this decision.
11	*Denied.* It is decisionally insignificant whether the tapes taken to WPRY on July 6 were the same or different from those taken to WPRY on July 4. See paras. 36–41 of this decision.
12	*Denied.* The Commission modifies paragraph 24 of the Findings of Fact to delete the statement in the last sentence that Cox "left under the impression that the Poppell spots would not be run." The requested additional findings that Brown asked Cox whether the Poppell tapes were to be run and Cox's reply referring to the arrangement Brown had made with Poppell thus become decisionally insignificant. The record is clear that the Poppell ads were run 12 times on July 7.
13	*Denied.* Brown's inability to recall the statement he wanted Cox to sign before releasing the original tapes is relevant to a weighing of Brown's testimony against Cox's for credibility.
14	*Denied.* It is decisionally insignificant that Brown at the request of the Broadcast Bureau left the witness stand to go home and returned promptly with uncashed salary checks of about $7,000 payable to him. A stipulation had been entered that the amount of uncancelled salary checks was over $200, an amount sufficient to have covered the amount due WPRY from Brown for political ads.
15(a), (b) and (c)	*Denied.* See para. 30 of this decision. With respect to the conclusions that Brown's denial of an appointment and of refusing Poppell political time were untrue and with respect to the nature of the receipt that Brown requested Cox to sign.
16	*Denied.* See para. 30 of this decision. The conclusions that Brown lacked candor in replying that Poppell received all the time he asked for is not inconsistent with the conclusion that Brown may have misunderstood how many times Poppell's spots were to be run. The first conclusion plainly is referring to the July 4 request for time—that is, "more time and at an earlier date."
17	*Denied.* See para. 32 of this decision, which supports the conclusion that Brown's statement that he paid for his ads was untrue.
18(a) and (b)	*Denied.* See paras. 35–42 of this decision with respect to the violation of Section 315 by the denial of equal time for Poppell.
(c)	*Granted* to the extent that the Initial Decision is corrected to make clear that Section 315 did not directly impose an obligation on WPRY to notify other candidates of Brown's use of the station. *Denied* in all other respects. See para. 43 of this decision.
(d)	*Denied.* See paras. 37–41 of this decision.
(e)	*Granted* to the extent that the Initial Decision is corrected to make clear that the airing of the rebuttals was not a violation of Section 315. *Denied* in all other respects. See paras. 44–45 of this decision.

Rulings on Exceptions of WPRY Radio Broadcasters, Inc.—Continued

Exception No.	*Ruling*
19(a)	*Denied.* The Examiner's conclusion that Brown at the July 5, 1969, evening meeting with Poppell offered only to sell time is supported by the record. See para. 40 of this decision.
(b)	*Denied.* Whether the conclusion in the Initial Decision on attempted censorship was correct becomes irrelevant under this decision. See para. 28 nn. 12 and 14.
(c)	*Denied.* See para. 44 with respect to the placement of rebuttals and paras. 35–42 with respect to the violation of Section 315 in denying Poppell equal time.
20	*Denied.* See paras. 35–44 of this decision.
21 and 22	*Denied.* See para. 34 of this decision with respect to the violations of Section 315 of the Act and Section 73.120(c) of the rules by the failure to charge Brown the same rates as those charged Jackson and the failure of Brown to pay even at the lower rates.
23	*Denied.* The record supports the conclusion that WPRY was used to serve Brown's political interests rather than the public interest. The record does not support the requested conclusion that there was no technical noncompliance with Section 315. See paras. 33–45.
24	*Denied.* The record supports the imposition of a forfeiture for willful and repeated violations of Section 315 and the Commission's Rules. The Commission is, however, cancelling the forfeiture.

Rulings on Exceptions of the Broadcast Bureau

Exception No.	*Ruling*
1	*Granted* in part. The first sentence of para. 16 of the Conclusions of the Initial Decision is modified to reflect Gross's association with the other local radio station during the campaign as set forth in para. 13 of this decision. *Denied* in all other respects.
2	*Granted* in accordance with para. 50 of this Decision.
3	*Denied.* Whether there was in fact a threat of bodily harm to Gross is decisionally insignificant. See n. 34 of this decision.
4	*Denied.* Paras. 52–58 of this decision adequately state the reasons for the Commission's conclusions that are contrary to those in para. 21 of the conclusions of the Initial Decision.
5 and 6	*Granted* in accordance with this decision.

F.C.C. 71D–82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WPRY RADIO BROADCASTERS, INC. For Renewal of License of Radio Station WPRY, Perry, Fla.	Docket No. 18885 File No. BR–2927

APPEARANCES

Thomas W. Fletcher, Esq., on behalf of WPRY Radio Broadcasters, Inc.; and *Charles W. Kelley, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued November 1, 1971; Released November 4, 1971)

PRELIMINARY STATEMENT

1. This proceeding was initiated by the Commission's action (FCC 70–650, released June 24, 1970) designating for hearing the application of WPRY Radio Broadcasters, Inc. (hereinafter WPRY), for renewal of the license of radio Station WPRY, Perry, Florida. The designation order also constituted a Notice of Apparent Liability in the amount of $10,000.00 or some lesser amount, for violation of the Communications Act and the Commission's Rules.

2. The designation order directed that the Chief, Broadcast Bureau, serve upon the applicant within 30 days a Bill of Particulars setting forth the basis for adoption of hearing issues (1), (2), and (3), *infra*. The Bill of Particulars was served on WPRY on July 24, 1970. The issues specified by the Commission are as follows:

> (1) To determine whether the applicant in its responses to the Commission was evasive, lacking in candor or misrepresented facts.
>
> (2) To determine whether during the period July 2 through 8, 1969,[1] [footnote omitted] the applicant violated Section 315 of the Communications Act of 1934, as amended; Sections 73.112 and 73.120(b), (c), or (d) of the Commission's Rules; or failed to fulfill the obligations imposed by the fairness doctrine.
>
> (3) To determine whether during the time Ira W. Brown was a legally qualified candidate for Mayor of Perry, the applicant used the station's facilities for the private interest of one of its principals or to achieve a personal advantage for him, rather than to serve the public interest.
>
> (4) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the applicant possesses the requisite qualifications to be and to remain a licensee of the Commission.
>
> (5) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the grant of the captioned application would serve the public interest, convenience and necessity.

The Commission ordered that the Broadcast Bureau "proceed with the initial presentation of the evidence with respect to Issues (1), (2)

and (3), and the applicant then proceed with its evidence and have the burden of establishing that it possesses the requisite qualifications to be a licensee of the Commission and that a grant of its application would serve the public interest, convenience and necessity".

3. Prehearing conferences were held on December 4, 1970, and January 26, 1971. Hearing sessions were held in Perry, Florida, on March 24 and 25, 1971. The record was closed at a final hearing session held in Washington, D.C., on May 4, 1971. Proposed findings of fact and conclusions were filed by the Broadcast Bureau on July 26, and by WPRY on July 27, 1971. A Reply was filed by WPRY on September 13, 1971, and a Limited Reply was filed by the Broadcast Bureau on September 10, 1971.

4. The witnesses who testified at the hearing are as follows:

(a) Ira W. Brown, general manager at WPRY from January 1963 until late July 1970; owner of one-third of stock in WPRY; candidate for Mayor of Perry, Florida in 1969.[1]

(b) Abraham Lincoln Poppell, a candidate for Mayor of Perry, Florida, in 1969.

(c) Norman Barry Gross, campaign worker for Mr. Poppell in 1969.

(d) Walter Albert Cox, a campaign worker for Mr. Poppell in 1969.

FINDINGS OF FACT

5. The Democratic Party's primary to select a candidate for Mayor of Perry, Florida, was held on July 8, 1969. Due to the lack of Republican voters in Perry, the Democratic nominee for any position is virtually assured of victory in the general election for which few voters ever turn out. The qualified candidates for the Democratic nomination for mayor were Ira W. Brown, Abraham Lincoln Poppell, Edwin Jackson, J. A. Livingston and Cecil B. Shealy. Each filed as a candidate on or before June 5, 1969.

6. Ira W. Brown owns a one-third interest in Station WPRY. From January 1963 through late July 1970, Brown was the General Manager of WPRY.[2] As the General Manager, he supervised the staff, sold commercial time, participated in production and generally directed the station's operations. Brown was the only salesman at WPRY in the period of June and July 1969. He handled all political accounts. His voice appeared on the air over WPRY during that period in sign-on, sign-off and commercial announcements as well as on other occasions which will be more fully discussed, *infra*.

7. The 1969 campaign was not Mr. Brown's first venture into politics. He had previously run for the Democratic nomination for County Judge in 1968. In each case, including 1969, Mr. Brown was unsuccessful.

8. Messrs. Brown and Poppell generally agree that they met by happenstance on the street in Perry, Florida, on about June 30, 1969. At that time Brown sought to sell, and Poppell to buy, commercial time on WPRY in connection with the latter's campaign for Mayor. The meeting resulted in Poppel's making an appointment with Brown

[1] The other two persons who each own a one-third interest in WPRY did not testify at the hearing and apparently played no part in the station's day-to-day operation.

[2] Brown testified that while nothing is definite, he is considering returning to his role as General Manager, with the concurrence of the other stockholders, after the instant proceeding is "cleared up".

to meet with the latter at 1 PM that same day at Station WPRY to make arrangements for the commercials on Poppell's behalf. Both Poppell and Brown agree that Brown was not at WPRY's studio at 1 PM (Tr. 134 and 170). Brown explains that he returned to the studio that day at about 1:20 PM, and was told that Poppell had been there and had left (Tr. 134). Poppell's recollection of the occurrence, which the Examiner finds more reliable than Brown's because of his reference to corroborating details, is that he arrived late for the 1 PM appointment, at about 1:10 or 1:15 PM and found that Brown was still not there. Poppell was told by a station employee (Mr. Stephens) that he did not know when Brown would be in. Poppell waited until 1:55 for Brown but had to leave then to return to work (Tr. 170). Poppell knew he left at 1:55 PM because he checked the time on his watch (Tr. 170). He made no arrangement to purchase political time during this visit to WPRY because he had been told that he had to see Mr. Brown for that purpose (Tr. 171).

9. After meeting with disappointment in his attempt to meet with Brown for the purchase of political announcements at WPRY, Mr. Poppell reported the incident to Mr. Norman Barry Gross who was aiding in his campaign. Mr. Gross, who is usually referred to as "Barry", is currently employed by the Florida State Department of Agriculture in Tallahassee, Florida. Prior to joining this organization, Mr. Gross worked on and off at a number of radio and television stations while attending college. Mr. Gross was employed at WPRY from May 30, 1966 until September 15, 1967. He worked at Station WGKR in Perry from November 12, 1967 until August 16, 1968 and, after holding intervening jobs at other stations, returned to work at WGKR from June 1 through July 3, 1969. Mr. Gross first met Mr. Poppell on June 25, 1969, when, as an employee of WGKR in Perry, he was called by the owner of Station WGKR to sell some political time to Mr. Poppell who had come to the owner's place of business to buy such time (Tr. 252).[3] Gross met Poppell at the owner's shop and took him directly out to the station. In making the sale, Gross wrote up some political announcements to be used on WGKR on Mr. Poppell's behalf. On that same day (June 25, 1969) Mr. Poppell asked Mr. Gross to assist him in his campaign. Gross agreed, refusing the pay Poppell offered.

10. When Poppell told him about Brown's failure to keep to 1 PM appointment on June 30, 1969, Gross advised Poppell of his belief that since Brown's voice broadcast over WPRY was familiar to the community from his being on the air so much and doing probably 90 percent of the WPRY commercial announcements, it might be possible for Poppell to get "free, equal, comparable time" over WPRY. Poppell told Gross that if he could get him such time then to go ahead and get it (Tr. 255).

11. On July 3, 1969, a telegram from Mr. Poppell was sent to the Commission (Broadcast Bureau Ex. No. 2). Identifying himself as a qualified candidate for Mayor of Perry, Poppell submitted a "formal complaint" that Brown, also a qualified candidate, had violated Section 315 of the Communications Act by not keeping his appointment

[3] At this time, Gross was only an announcer at WGKR, he was not a salesman, and had never before sold time for the station. He holds an FCC third class operator's license.

to sell Poppell time while, at the same time, conducting "a heavy commercial campaign" on his own behalf over WPRY and also appearing on the air in non-political respects. The telegram asserted that Brown's voice is well-known in the community and that the primary was only 5 days hence, on July 8, 1969. Barry Gross had a part in drafting that telegram to the Commission. Another Poppell campaign worker, Walter Cox, also played a part in composing the telegram on July 2, and took the telegram to the Tallahassee Western Union Office early on the following day and sent it. Mr. Poppell authorized the sending of the telegram after it had been discussed and very carefully written. On July 3, 1969, the Commission responded to Mr. Poppell's telegram (Broadcast Bureau Ex. No. 3). The Commission's response, a copy of which was sent to and received by Mr. Brown on July 3, 1969, at WPRY, recited the allegations contained in the earlier telegram and closed by stating: "Commission advised by station that it will afford you equal opportunities upon request by you". (Broadcast Bureau Ex. No. 3, Tr. 93). The Commission's remark was based on the fact that on July 3, 1969, Mr. Brown assured Mr. William Ray of the Commission over the telephone that he would afford Mr. Poppell equal time (Tr. 333).

12. In receipt of the Commission's assurance that WPRY would afford Mr. Poppell "equal opportunities upon request by him" Messrs. Gross and Cox went to WPRY on July 4, 1969, to seek equal time on Mr. Poppell's behalf (Tr. 255 and 293).

13. Mr. Walter Cox, who holds an FCC First Class Radio Telephone License, is currently employed in Perry, Florida, at Ketring Electronics. Other than helping out in Mr. Poppell's campaign, Mr. Cox was unemployed in June and July 1969, while preparing to attend Florida State University. Cox was asked by Poppell to help out in the campaign. He agreed and started on June 26, 1969 (Tr. 292). Cox, who is a distant relative of Mr. Poppell, helped out by handing out campaign literature and speaking to people on Poppell's behalf in addition to his other activities which will be discussed more fully, *infra*. Cox, with Gross, was a co-manager of Poppell's campaign (Tr. 313).

14. When they went to WPRY on July 4, 1969, Cox and Gross went in response to a specific request by Mr. Poppell (Tr. 294). Cox, Gross and Poppell each testified that Brown's voice was recognizable when heard over the air even when he was unidentified (Tr. 179–180, 254 and 294). Accordingly, when Cox and Gross went to WPRY they were prepared to request 51 minutes of free time on Mr. Poppell's behalf. They had arrived at this amount by totalling up the number of minutes Brown had appeared on the air over WPRY on July 3, 1969, excluding political announcements on Brown's behalf (Tr. 286–287 and 293–294). Gross and Cox based that figure on tape recordings of WPRY's July 3, 1969, broadcast day [4] (Tr. 286–287). These tapes had been recorded on a "logging machine" which had been set up at Ketring Electronics to record the daily transmissions of WPRY (Tr. 282–283).

[4] The 51 minute total, as computed by Gross and Cox, is generally confirmed by Brown himself. In his October 9, 1969, response (Broadcast Bureau Ex. 11) to the Commission's letter of September 24, 1969 (Broadcast Bureau Ex. No. 10), Brown indicated that he was on the air for 50 minutes on July 3, 1969, excluding political announcements on his behalf. The 51 minute total was composed of Brown's giving commercial announcements, news introductions, sign-on and sign-off (Tr. 287 and 294).

Mr. Ketring is now a part owner of WGKR and the station's chief engineer. In June and July 1969 he was the sole owner of WGKR (Tr. 279). In addition to a record of Brown's nonpolitical use of WPRY on July 3, 1969, Gross and Cox went to the station equipped with taped political announcements prepared for use on Poppell's behalf. They also had scripts of what was said on the tapes (Tr. 269). Mr. Gross was of the belief that Mr. Poppell's voice appeared on one of the tapes (Tr. 274). But Mr. Cox testified that Poppell's voice did not appear on any of the tapes brought to WPRY on July 4, 1969 (Tr. 308). In addition to the tapes, Cox testified he brought with him to WPRY a copy of the *Federal Register*, Vol. 31, No. 86, Part 2, dated Wednesday, May 4, 1966, entitled "Use of Broadcast Facilities by Candidates for Public Office" (Tr. 310–311).

15. When they arrived at WPRY on July 4, 1969, Gross and Cox found that Mr. Brown was not there. They inquired as to Brown's whereabouts and were told that he was unavailable. They talked with Mr. Ronald McGowan, WPRY's Program Director. Gross and Cox told Mr. McGowan that they had come to get some time for Mr. Poppell. McGowan offered to sell it to them. They told McGowan that they believed Mr. Poppell was entitled to free time and they asked for 51 minutes (Tr. 258, 288). Cox showed McGowan the copy of the *Federal Register* referred to above with special reference to questions concerning what constitutes a "Use" by a political candidate (Tr. 311–312). Gross and Cox pointed to Brown's commercial announcements over the station as the "uses" to which they referred (Tr. 256). McGowan's initial reaction was that Gross and Cox were joking. When he realized they were serious, McGowan called in WPRY's engineer and asked his opinion (Tr. 256). The latter said he did not know what to do about the request, and he accused Gross and Cox of just trying to stir up trouble (Tr. 312), and they replied they were only trying to get what Poppell was entitled to have. The meeting ended with McGowan telling Cox and Gross that he had no authority to give Poppell free time and that they would have to see Mr. Brown (Tr. 256–257). McGowan did not ask to listen to the tape recordings Gross and Cox brought with them (Tr. 269). Gross was not sure whether or not McGowan read the scripts for them (Tr. 269).

16. On July 4, 1969, Brown went to his brother's farm for the day, as was his custom on July 4. He spent the entire day there, returning either late in the afternoon or late in the evening (Tr. 334 and 373). After he arrived back at his home in Perry, Brown received a telephone call from McGowan, who related that Cox and Gross had come into WPRY that day and had asked for free time for Mr. Poppell (Tr. 335). Brown confirmed that McGowan had no authority to give free political time to Mr. Poppell (Tr. 337). WPRY was on the air on July 4, 1969, but no one at the station knew where Brown was that day because he intentionally did not tell them (Tr. 371).[5] Brown did not mention to McGowan the possibility that Mr. Poppell, or someone on his behalf, might come in on the Fourth of July to obtain political time. Brown agreed that if Poppell personally had tried, he would not have been able to get in touch with Brown during working hours

[5] Brown testified: "* * * it wasn't my policy to tell them where I was." (Tr. 371)

on the Fourth. After Brown returned home on that date, he was informed by McGowan that Gross and Cox had been at WPRY requesting time and they had been told McGowan was not authorized to give it to them (Tr. 335, 371–373). Brown made no attempt, after being informed of the incident, to reach Poppell on the Fourth of July in order to offer him free time or for any other purpose (Tr. 374).

17. After his unsuccessful attempt to obtain free comparable political time on Mr. Poppell's behalf on July 4, 1969, Gross went to the studios of WGKR. While there he received a telephone call from WPRY disc jockey William Stephens. Stephens, speaking in a screaming, angry manner, told Gross that he had better not go back over to WPRY as he had done, and act as he did. Stephens also said that he did not "appreciate" what Gross was trying to do. Stephens did not say he would strike Gross if the latter returned to WPRY. Gross testified that Stephens also told him that if Gross knew what was good for him he had better keep away, or something to that effect. Gross construed Stephens' remarks to him as a threat of bodily harm should he return to WPRY. (Tr. 257–260).[5a] No one told Brown on July 4 about the telephone threat to Gross by Stephens, and Brown learned about it in a letter from the Commission at a later date (Tr. 335–336).

18. Poppell, after his emissaries unsuccessfully asked for free time at WPRY and Gross was threatened by a WPRY employee for their efforts, sent a second telegram to the Commission (Broadcast Bureau Ex. No. 4, Tr. 186–187). This telegram, like the earlier one, was drafted by Gross and Cox and authorized by Poppell (Tr. 186–187, 268 and 295). This telegram, drafted on July 4 and sent at 2:11 AM on July 5, 1969, relates the failure of Gross and Cox to contact Brown, the lack of authorization to WPRY personnel to afford equal comparable time to Poppell's representatives on his behalf, and mentions a threat of "bodily harm" made against one of these representatives (Broadcast Bureau Ex. No. 4, Tr. 295).

19. On Saturday, July 5, 1969, at 3:23 PM, Ira Brown sent Poppell a telegram (copy to the Commission) informing Poppell that he should appear in person at the studios of WPRY at 6 PM that day where he would be afforded his "equal opportunity offered under Section 315 FCC" (Broadcast Bureau Ex. No. 5). That telegraphic offer was made in response to the Commission's inquiry of WPRY which is reflected in the Commission's telegram of July 5, 1969 (Broadcast Bureau Ex. No. 6). This latter telegram from the Commission was addressed to Messrs. Poppell and Brown.[6]

20. On the evening of July 5, 1969, Brown met with Poppell at the studios of WPRY and offered to sell him political time (Tr. 338–

[5a] After receipt of Stephens' message, Gross and Cox proceeded to Poppell's home where Gross told him about Stephens' call. At this time, Stephens appeared, was scolded by Poppell for having made the threat and told to register any future complaints with him Poppell). Stephens, in the presence of Poppell, Gross and Cox, apologized for his earlier remarks to Gross (Tr. 261–263, 193–194, and 304–305).

[6] The Commission's telegraph repeats the charge contained in Poppell's telegram (Broadcast Bureau Ex. No. 4) and informs Poppell that it is not clear whether the spots which were refused by WPRY contained his voice only or the voices of his representatives. The Commission explained that under Section 315, Poppell's voice must appear and use all or part of the time to which he is entitled. It concludes by stating the Commission has been advised by WPRY that it will provide Poppell an "equal opportunity".

339).[7] Poppell did not accept the offer. At his suggestion, they arranged to meet the following morning—Sunday, July 6, 1969 (Tr. 338–339).

21. On Sunday morning, July 6, 1969, Brown met with Poppell, Gross and Cox at WPRY. The meeting took place at 10:00 AM in the production studio (Tr. 264). Cox, Gross and Poppell brought with them three tape recorded spot announcements, each of which, in part, contained an introductory statement by Mr. Poppell: "I am Abe Poppell, candidate for Mayor for the City of Perry." (Tr. 264, 298, 342). Brown listened to the tapes, made a copy of them, and told Poppell, Cox and Gross that they had "better be able to prove the charges contained therein (Tr. 297, 264–265). Each of the Poppell spot announcements charged that Ira Brown had failed to pay a local tax (Broadcast Bureau Ex. No. 1, p. 1, Stipulation No. (3)). After listening to the spots, Brown asked to talk to Poppell alone and Poppell agreed to this (Tr. 209, 265, 297). Brown then stated to Poppell concerning the tax charge: "Abe, I don't know where you got this from, but you should go back and check it. These taxes have been paid." (Tr. 341). Brown then added that if Poppell insisted, the tapes would be run (Ibid). Poppell offered to pay to have WPRY run his political spots. Brown refused payment, informing Poppell that he was entitled to free time (Tr. 209–210). Brown asked Poppell to make a new tape but Poppell did not accede to this request (Tr. 210). When the meeting ended Brown had agreed to run Poppell's spots the next day which was a Monday just before the primary election on Tuesday. Poppell asked that "the whole tape", meaning each spot on the two tapes, be run each hour during WPRY's entire broadcast day (Tr. 210–211). Poppell admits, however, that Brown may have misunderstood his request as to how many of the spots should run each hour (Tr. 210–211). Brown testified that Poppell merely asked that his spot announcements be run one per hour for twelve hours (Tr. 144).

22. After the meeting at WPRY on Sunday morning, Brown went to Poppell's home in the afternoon to show Poppell a tax receipt as proof that the local tax had been paid. Brown then asked if Poppell still wanted to run the same tapes as scheduled. Although Poppell replied that he would consult with his advisers, Brown understood that he wanted to have those tapes aired (Tr. 343–344). Poppell recalls that Brown at this time refused to run his political spots because of their content and because they were not entirely in his own voice (Tr. 204–208). Brown, on the other hand, denies having informed Poppell that the tapes would not be run (Tr. 147–148).

23. On Sunday evening, July 6, Mr. Cox received a message that Brown had called his home, requesting that Cox call WPRY. Cox returned Brown's call (Tr. 298). Brown told Cox that he could not run Poppell's political announcements because he did not want to get Cox, Gross and Poppell in trouble. Asked by Cox if he was refusing to run the announcements because of their content Cox reported that

[7] Later in his testimony, Brown claimed that he offered Poppell free time at this meeting (Tr. 375). Poppell does not recall this meeting (Tr. 220). Notwithstanding Brown's later testimony, his earlier testimony at Tr. 338–339 referring to "purchasing time" and the sale of time to a candidate unequivocally indicates that Brown at this meeting was only offering to sell time to Poppell.

Brown said: "Call it what you like, content, or whatever; I just don't want to get you in trouble" (Tr. 298–299). Brown denies having made this call to Cox (Tr. 345). However, at 2:04 AM on July 7, 1969, a third telegram from Mr. Poppell was sent to the Commission (Broadcast Bureau Ex. No. 7). This telegram was composed by Mr. Cox in Mr. Poppell's presence on the evening of July 6, 1969 (Tr. 295–296). Mr. Poppell authorized the sending of this telegram (Tr. 203). The telegram reported that after having agreed at 10:00 AM on July 6, 1969, to run Poppell's announcements, Brown came by Poppell's home at 3:10 PM and refused to broadcast the announcements. The telegram further reported that when asked by Cox why they would not be run, Mr. Brown said it was due to content (Broadcast Bureau Ex. No. 7).[8]

24. On July 7, 1969, Cox went to WPRY's studio at about 8:45 AM to pick up the tapes which Brown had told him the evening before would not be broadcast. A station employee told Cox that if Poppell wanted the tapes he could come and get them himself (Tr. 299). Cox left. Later he was notified to call Brown. Cox then returned to WPRY. Brown asked Cox to sign a statement on behalf of Poppell and his two associates before taking the tapes. The statement was to the effect that Cox, Gross and Poppell would drop all the charges they had made against Brown and WPRY (Tr. 299–300). Cox refused to sign the statement (Tr. 300). Cox then took the tapes and left under the impression that the Poppell spots would not be run (Tr. 300).

25. Brown has denied Cox's account of the events of Monday, July 7, 1969. Brown stated that Cox called at WPRY on July 7, 1969, and asked for the Poppell tapes. Brown says he did not ask Cox to drop any charges, but merely asked Cox to sign a receipt for the tapes (Tr. 345). In the Examiner's view, Cox's much more positive recollection about the incident makes his testimony worthy of credence and more reliable than Brown's. It is significant that Brown in his testimony could not recall the contents of the statement he wanted Cox to sign

26. Brown returned the original Poppell tapes to Cox. However, twelve Poppell spot announcements were broadcast over WPRY on July 7, 1969 (Broadcast Bureau Ex. No. 1, Stipulation No. (2)). Each of those 12 announcements made over WPRY charged that Ira Brown had failed to pay a local tax (Broadcast Bureau Ex. No. 1, Stipulation No. (3)). Each of the 12 Poppell announcements was followed immediately, or within a few minutes, by an announcement by Mr. Brown which attempted to rebut the charges made in the Poppell announcements (Broadcast Bureau Ex. No. 1, Stipulation (4)). In each of the rebuttal announcements it was stated by Brown that the tax referred to in the Poppell announcement was charged to a partner of his and had already been paid (Broadcast Bureau Ex. No. 1, Stipulation No. (5)).

Logging violations

27. Despite the fact that Brown's rebuttal to Poppell's charge was broadcast 12 times on July 7, 1969, it was logged only one time in the WPRY program log for July 7, 1969 (Broadcast Bureau Ex. No. 1,

[8] The sending of the telegram (Broadcast Bureau Ex. No. 7) corroborates Cox's testimony and casts doubt upon the accuracy of Brown's denial of refusal to broadcast the announcements. In addition, the Examiner's observation of Cox's conduct and demeanor on the stand resulted in the firm impression that he was a credible witness.

Stipulation No. (7)).[9] Brown explained that after making a tape recording of his rebuttal to Poppell's charge, he ordered the station's disc jockeys to run the tape after each of the Poppell spots. Following a phone call from Cox, after the first broadcast of the rebuttal tape, in which call Cox complained of the adjacency of the rebuttal to Poppell's spot, Brown called Mr. William Ray of the Commission and understood from the conversation with Ray that he had the right to broadcast the rebuttal at any period behind the Poppell announcement (Tr. 349). Brown said that he was preoccupied with other matters and forgot to make up a start order for the rebuttal announcements, and that such an order is the key for getting the announcements into the log (Tr. 350–352).

Payments for political announcements

28. Edwin Jackson, a legally qualified candidate for Mayor of Perry in the same primary campaign in which Brown and Poppell participated, was charged $42.00 by WPRY for twenty-eight 60-second political spot announcements broadcast over WPRY. The cost Jackson paid was, therefore, $1.50 per one minute spot (Broadcast Bureau Ex. No. 1, Stipulation No. (8)).[10] Brown ran and logged eighty-six 20-second spots; two 30-second spots; and thirty-seven one minute spots on his own behalf between June 25 and July 8, 1969 (Tr. 115–116). In addition, he ran the eleven 35-second tax rebuttal announcements which were not logged. Considering these latter to be 30-second spots brings the number of thirty-second political spots run on Brown's behalf to thirteen. Brown testified (Tr. 116–117) that, at the time, the standard rates for commercials at WPRY were as follows:

Twenty seconds—$1.00.
Thirty seconds—$1.20 or $1.25.
Sixty seconds—$1.50.

Based on the above figures, Brown should have billed himself $86.00 for the 20-second spots; $25.60 for the 30-second spots (at the $1.20 rate) and $55.50 for the 60-second spots, or a total of $157.10. In fact, the sole payment made by Brown was by a check in the amount of $120.00 paid to the order of WPRY Radio Incorporated, drawn on the account of WPRY Radio, Inc., and signed by Ira Brown (Broadcast Bureau Ex. No. 1, Stipulation No. (10)).

29. Brown explained his failure to bill himself for the full amount of $157.10 by pointing out that not all his political spots ran for the full time. In those cases he prorated the charge to himself (Tr. 129–130). Brown testified that the script of his "20-second" spots actually took 20 seconds to read (Tr. 125–126, Broadcast Bureau Ex. No. 29). The script of one of his "60-second" spots ran 50 seconds. (Tr. 129, Broadcast Bureau Ex. No. 30). The script of his other 60-second spots

[9] Section 73.112(a)(4)(ii) of the Commission's Rules requires that one entry be made in the program log for each announcement presenting a political candidate, showing the name and political affiliation of such candidate.

[10] By check dated March 15, 1971 (9 days before the start of the hearing) WPRY repaid Mr. Jackson the $42.00 (WPRY Ex. No. 2).

ran only about 42 seconds [11] (Broadcast Bureau Ex. No. 32). Brown's tax rebuttal announcement, which was counted as a 30-second spot, *supra*, actually ran over 30-seconds (Broadcast Bureau Ex. No. 31). Brown could think of no other instance where he pro-rated a commercial for a customer (Tr. 129). He pro-rated for himself and no one else (Tr. 129–130).

30. There was no change in the balance of the WPRY Radio, Inc., bank account as a result of the check with which Brown "paid" for his political spots since it was drawn on, and subsequently deposited in, the WPRY account (Broadcast Bureau Ex. No. 1, Stipulation No. (11)). At the hearing, Brown produced uncashed salary checks made out to him and drawn on WPRY's account in an amount in excess of $200.00, prior to July 7, 1969 (Tr. 401–402). Brown assumed that since there wasn't any direct cash involved, his obligation for his political announcements could be deducted from the amount of money the station owed him (Tr. 357). However, the $120.00 was never deducted from the money the station owed Brown. Brown said that it would be someday (Tr. 395). Asked if his fellow stockholders recognized the legitimacy of the uncashed payroll checks made out to himself, Brown answered that the two other stockholders, Mr. Pepin and Mr. Buckler know about the checks (Tr. 406).

31. Brown's salary arrangement with WPRY in July 1969, was set at $125 per week; $25.00 expense account, $50.00 received salary, and $50.00 continuing salary (Tr. 356–357). At that time the station owed Brown quite a bit of money for back salary (Tr. 357), represented by uncancelled payroll checks (Tr. 406).

Financial status of WPRY

32. In 1970, WPRY Radio Broadcasters, Inc. incurred a loss of $5,285 in the operation of Station WPRY (WPRY Ex. No. 1). In 1968, WPRY realized a net operating profit of approximately $8,000 (Broadcast Bureau Ex. No. 38), and in 1969, the station's net operating income was about $3,900 (Broadcast Bureau Ex. No. 39).

RESPONSES TO COMMISSION INQUIRY

Threat to Gross

33. After the 1969 primary campaign was over, Barry Gross wrote a letter of complaint to the Commission wherein he described Mr. Poppell's difficulties with WPRY and Mr. Brown (Broadcast Bureau Ex. No. 8, pp. 2–4). In that letter, Mr. Gross stated that on July 4, 1969 he had appeared at WPRY with Mr. Cox and they asked for "free, equal, comparable time" on the station for Mr. A. L. Poppell. Gross further stated that "We were denied the equal time, and a short time after our leaving WPRY Radio station, I received a telephone call from one of the announcers at WPRY saying that if I entered the station again, I would be bodily harmed. So besides being denied the equal time, I was threatened with bodily harm." Mr. Gross continued in the letter to set forth certain events which occurred on July 5, 6 and

[11] The spot's script shows that it was run only on July 8, 1969, Election Day (Broadcast Bureau Ex. No. 32). From the log of that day it can be seen that, at most, the spot ran only sixt times at 1:35, 3:20, 4:55, 5:20, 5:48 and 6:27 PM. All other Ira Brown political spots that day are logged as 20 seconds in duration (Broadcast Bureau Ex. No. 27).

7, 1969 relative to the matter of free and equal time for Mr. Poppell. The letter makes it clear that, *inter alia*, Gross was complaining of a telephone threat of "bodily harm" by an employee of WPRY, which allegedly occurred on July 4, 1969. The complaint by Gross is dated July 16, 1969. It was transmitted to WPRY by the Commission by letter dated August 7, 1969 (Broadcast Bureau Ex. No. 8, p. 1).

34. In his response of August 19, 1969, Brown replied to the questions raised by Gross regarding the request for free time on behalf of Mr. Poppell. The only comment contained in Brown's letter with respect to the threat of "bodily harm" to Gross is the following:

> I am yet very much at a loss to understand why Barry Gross would write a letter of this nature to you and then express that he was bodily threatened. In my views Mr. Gross is only a teenager and I or anyone of my staff would not exercise bodily force on anyone regardless of their independent and depressive actions on our property. (Broadcast Bureau Ex. No. 9, p. 1).

It was not apparent on the face of the response that any investigation or inquiry of employees was made by Brown regarding the reported threat to Mr. Gross.

35. On September 24, 1969, the Commission addressed another letter of inquiry specifying the various areas of Gross' initial allegations of July 16, 1969 and requiring answers thereto (Broadcast Bureau Ex. No. 10). With regard to the allegation of threat of bodily harm, the Commission quoted Brown's response (see *supra*) and inquired:

> State whether any of your employees did or did not threaten Mr. Gross with bodily harm. Please submit signed statements by each of the persons employed by the station *on the date of* the alleged incident reciting his admissions or denials.

The Commission again enclosed a copy of Gross' complaint of July 16, 1969, wherein he recited that the threat of bodily harm had been made by an employee of WPRY on July 4, 1969.

36. Brown, on behalf of WPRY, on October 9, 1969, responded to the Commission's second inquiry (Broadcast Bureau Ex. No. 11). Regarding the Commission's inquiry as to the threat of bodily harm, Brown stated:

> * * * The telephone call mentioned in paragraph 8, I have no recollection of this as I have talked with my d.j.'s and they say no conversation was carried on in this manner. That when he called he only wanted to know if I had come in. There was no bodily harm threatened on or off the premises of WPRY.

Immediately following this statement there appears this language:

> Dated October 8, 1969.
> I, Ronald McGowan, Program director, Ira W. Brown, Manager, William H. McHargue, Engineer, did not *on the date specified, July 4, 1969,* or any other date or time threaten bodily harm to Barry Gross by telephone or in person.
> All persons here-on mentioned being in sound mind and signed this date, October 8, 1969.

There then appears the signatures of the three individuals named.

37. It will be noted that the persons submitting the joint statement were not disc jockeys. It will also be noted that the persons all made reference to the threat *on the date specified, July 4, 1969.* Thus it is clear that Brown and the others in the joint statement were talking about the alleged incident of July 4, 1969 and their knowledge about that incident.

38. In one important aspect Brown's response was untrue. He had not talked to any disc jockeys at that time regarding the incident (Tr. 154–155). In another respect the response was misleading. None of the persons who signed the statement were disc jockeys and only one, McGowan, was a *part*-time announcer (See Broadcast Bureau Ex. No. 23, p. 5).

39. The Commission, in an attempt to get more responsive information to its inquiry, again wrote to the licensee on December 24, 1969 (Broadcast Bureau Ex. No. 33). With regard to the allegation of threat of bodily harm to Gross the Commission stated:

> 8. In the Commission's inquiry of September 24, you were requested to 'state whether any of your employees did or did not threaten Mr. Gross with bodily harm' and to 'submit signed statements *by each of the persons employed by the station on the date of the alleged incident*, reciting his admissions or denials' (emphasis added). In your letter of October 9 you submitted a statement signed by Messrs. Ronald McGowan and William H. McHargue and yourself denying Mr. Gross' allegations concerning threats of personal injury. However, it appears that you have not submitted statements from all persons *in your employ at the time of the alleged incident*, since the logs of July 5, 6 and 7, which you furnished the Commission, indicate that they were signed by Messrs. J. H. Randall, Danny Ellison, and Bill Stephens. Please include their signed statements, regarding Question 8 of the Commission's September 24 letter, and your reasons for failing to include them in your October 9 response.

40. Brown, the General Manager, should have known there were other employees of the station since they had signed logs on July 5, 6 and 7, and undoubtedly other station records concerning employees were also available to him. Yet he failed to make a complete response to the Commission's letter of September 24, 1969, by not submitting their statements or indicating their unavailability, if such was the case.

41. In response to the Commission's letter of December 24, 1969 (Broadcast Bureau Ex. No. 34), Brown, on January 12, 1970, wrote regarding the alleged threats as follows:

> Par. VIII.—I was not aware that the additional names submitted by you in your letter was employed at the time. Must have been week-end work, or otherwise. J. Hudson Randall or Bill Stephens is not employed by WPRY and have not been for sometime. I do not know the whereabouts of these two gentlemen but I will make every effort to locate them *and ask them the same questions asked the other employees concerning threatening Mr. Gross, by phone or in person.* I was able to locate Mr. Danny Ellison and his signed statement is enclosed. (Emphasis added)

Mr. Ellison's statement which is dated January 2, 1970, states that he "did not on the date specified, July 4, 1969, or any other date or time threaten bodily harm to Barry Gross by telephone or in person". Mr. Brown had sent this statement to Ellison to sign (Tr. 155). It was composed by Mr. Brown.

42. Mr. Brown forwarded statements prepared by him to Mr. Randall in Georgia and Mr. Stephens in Texas for their respective signatures. The letter to Stephens stated, in part: "Dear Bill, enclosed please find statement that you did not try to hurt or injure our friend Barry Gross, on the political case of which you are acquainted". (Tr. 160). Brown testified that he did not include a letter to the effect that Stephens did threaten bodily harm to Gross but Stephens could have written a letter of this tenor on his own (Tr. 161). The letter to Randall

read in part: "Dear Hudson, enclosed please find statement to the effect you did not threaten or in any way pursue harm to Mr. Barry Gross as he has claimed someone from here threatened him. * * * I would assume that you won't mind signing it as you did not even know that the problem in Mr. Gross' charge existed." (Tr. 163–164). Both Stephens and Randall signed the statements as submitted to them by Brown, and these responses were in turn forwarded by Brown to the Commission (Broadcast Bureau Ex. No. 36).

43. Brown testified at the hearing on the question of why the statements of the disc jockeys were not included with his October 9, 1969 response to the Commission which is identified as Broadcast Bureau Ex. No. 11. Under cross-examination by Bureau counsel, Brown stated that the disc jockeys' statements were not included because they were not at the time working at WPRY and he did not know where they were (Tr. 154). Later, when being examined by WPRY's attorney, Brown testified that he had not included the disc jockeys' statements because he thought that the Commission was asking for statements by employees working at WPRY at the time the Commission's September 24, 1969 letter was received at the station (Tr. 362). Asked subsequently on cross-examination if the Commission's September 24, 1969 letter (Broadcast Bureau Ex. No. 10) is not perfectly clear as to the fact that the Commission wanted statements from all persons employed at WPRY on July 4, 1969, Brown simply replied that he had made an oversight in reading and replying to that letter (Tr. 378).

44. The last two responses are not consistent with the initial answer, nor is the first of these three answers consistent with the original reason which was advanced in Brown's letter to the Commission dated January 12, 1970, (Broadcast Bureau Ex. No. 34), namely, that he was not aware on October 9, 1969, that Ellison, Randall and Stephens were working at WPRY on July 4, 1969. This reason, as well as the last two responses in Brown's testimony noted above, evidence carelessness on Brown's part in responding to Commission inquiries, and his initial response given in his testimony, if accurate, reflected a lack of candor. But it is not outside the realm of probability that, as stated in Brown's letter of October 9, 1969, he did not recall that Ellison, Randall and Stephens were employed with the station on July 4, even though he could have readily ascertained from the date's program logs what the facts as to their employment then were.

Political advertising

45. In his letter of complaint mentioned above (Broadcast Bureau Ex. No. 8), Mr. Gross described the problems Mr. Poppell had with Station WPRY in attempting to get his political spots on the air. These matters have been discussed extensively above. The Commission, as is noted above, sent a copy of Mr. Gross' letter to Brown on August 7, 1969, and requested comments thereon. Ira Brown replied by letter dated August 9, 1969. Brown's "comments" consisted of a general denial of the charges in Gross' letter and a counter-attack on Mr. Gross.

Accordingly, on September 24, 1969, the Commission sent a second letter to Mr. Brown and WPRY pointing out his failure to reply to a number of the specific allegations in Mr. Gross' letter. The Commission asked Mr. Brown a number of specific questions (Broadcast Bureau Ex. No. 10). Mr. Brown replied by letter dated October 9, 1969 (Broadcast Bureau Ex. No. 11).[12] Following are, under (a), some of the questions asked by the Commission;[13] under (B), Mr. Brown's responses to those questions;[14] and under (C), the facts as developed in the hearing record.

(A) (3)a. State the number, duration and time of all announcements broadcast by WPRY on behalf of your candidacy.

(B) 100–20 second spots, 13–40 second spots, 13–60 second spots.

(C) 86–20 second spots; 13–30 second spots;[15] 37–1 minute spots (see paragraph 28, *supra*).

(A) "(7) Mr. Gross made the following allegation to which you did not respond:

> On this very same morning [Monday, July 7, 1969], at 9:45 a.m., Ira W. Brown ran one of Mr. Poppell's political spots, *and then tagged it in his own voice with a political announcement for Ira W. Brown without a disclaimer!* In fact, it closed out by saying, . . . "Thank you very much. This is your candidate for Mayor, Ira W. Brown."
>
> Ira W. Brown ran several of these spots that day, and each one was tagged with a political announcement in Brown's voice without any disclaimer whatsoever.
>
> * * * * * * *
>
> Evidently, Ira W. Brown used WPRY to his advantage while allowing Mr. Poppell only several spots, and they were even tagged with a political rebuttal. . . . I believe that when Ira Brown tagged all of Mr. Poppell's spots, for the benefit of Mr. Brown, he may not have ever entered the illegal tags on the program log as being of political nature, and probably didn't pay a cent for his so-called tags.
>
> a. State whether you broadcast any announcement on behalf of your candidacy immediately following the announcements by Mr. Poppell referred to above.
>
> b. Submit copies of your logs for the period July 5–7, 1969, inclusive."

(B) Brown responded as follows:

> Par. VIII. On the morning of July 7, Poppell's commercial was run from 9:47 to 9:48 A.M. There was a one minute musical interlude and there was no disclaimer as the disclaimer was on the beginning of the tape and it was not in the voice of Ira W. Brown.
>
> Par. VII—2nd. This was the only spot run even this close together and it is a practice that all paid political announcements, (whether paid or not), is done by d.j.'s. My voice was nowhere on or near the tape of A. L. Poppell.
>
> Par. VII—3rd. Mr. Poppell received all advertisement he asked for. They were not tagged with political rebuttal and they were not for the benefit of myself. When announcements are made on the air of WPRY I assure you that it is logged and designated, and I paid this corporation for the advertisement I did, although Mr. Poppell was awarded what he asked for when he asked for it without charge. If you will, remember the tele-

[12] With this letter Brown enclosed WPRY program logs as part of his response. Brown testified that he meant the Commission to understand that the July 7, 1969 log (Broadcast Bureau Ex. No. 26) reflected all his political spots run over WPRY on that day (Tr. 151).

[13] All from Broadcast Bureau Ex. No. 10.

[14] All from Broadcast Bureau Ex. No. 11.

[15] Includes 11 unlogged spots.

phone conversation between you and I that morning at which time you stated that a rebuttal was legal but I did not pursue it to the fullest extent.

Par. VII(a)—This announcement was not immediately after that of Poppell, and throughout the day it did not appear even as close as the 9:47 to 9:48 commercial.

(C) The first Poppell spot did run at 9:47 A.M. It was 60 seconds long. The Brown spot run in rebuttal began at 9:48 A.M. (See Broadcast Bureau Ex. No. 28 and Tr. 348).

Brown's tax rebuttal announcements were not tagged as political announcements (Broadcast Bureau Ex. No. 1, Stipulation (6)).

Brown's spots in rebuttal to the Poppell spots with one exception, were not logged at WPRY (Tr. 150–151, 350–353, Broadcast Bureau Ex. No. 1, Stipulation (7)).

Brown has never paid WPRY for the spots run on his behalf but intends to do so someday by deducting $120.00 from back-salary owed him by WPRY. (Tr. 395).

The following are the broadcast times of the logged Poppell spots and the unlogged Brown rebuttal spots:

10:24 AM	3:28 PM
10:26 AM	5:23 PM
11:28 AM	5:27 PM
11:30 AM	5:32 PM
12:34 PM	5:36 PM
12:35 PM	6:46 PM
1:40 PM	6:47 PM
1:42 PM	7:45 PM
2:48 PM	7:50 PM
2:50 PM	8:25 PM
3:25 PM	8:29 PM

(Broadcast Bureau Ex. No. 28)

46. Unsatisfied with Brown's response, the Commission sent Brown a third letter on December 24, 1969 (Broadcast Bureau Ex. No. 33). This letter asked Brown to explain why a 35-second tax receipt announcement (Broadcast Bureau Ex. No. 31), which Brown had indicated had been broadcast over WPRY on his behalf, had not been listed by him in his prior response concerning the number, duration and time of all announcements broadcast on behalf of his candidacy. Brown's response, dated January 12, 1970 (Broadcast Bureau Ex. No. 34), stated that he had no record of any 35-second announcements broadcast on his behalf and that the Commission must have miscalculated the duration of the announcement. At the hearing Brown testified (Tr. 129) that the tax receipt announcement was a 30-second commercial.[16] Brown was also asked whether he had paid for the 35-second announcements; whether they were in his voice; and how they were logged (Broadcast Bureau Ex. No. 33, para. 4.c.). Brown, in his response, again denied knowledge of any such 35-second announcement and stated that all announcements on behalf of his candidacy "were tagged as a political announcement" (Broadcast Bureau Ex. No. 34, para. IV(c)). In addition, the Commission asked

[16] No 30-second commercials were listed by Brown in his earlier reply of October 9, 1969 (Broadcast Bureau Ex. No. 11).

Brown to explain why the twenty-six 40-second and 60-second spots broadcast on behalf of his candidacy cost less than the amounts charged other candidates for political announcements broadcast over WPRY (Broadcast Bureau Ex. No. 33, para. 5(a)). Brown simply responded that $20.00 was used to pay for those spots (Broadcast Bureau Ex. No. 34). He prefaced that remark by stating that he had once been told by an FCC engineer that the Commission did not care how much anyone was charged for such commercials (Broadcast Bureau Ex. No. 34, para. IV).

CONCLUSIONS

1. Issue 1 requires a determination on the question of whether the applicant in its responses to Commission letters of August 7, September 24 and December 24, 1969 was evasive, lacking in candor or misrepresented facts. The findings of fact herein reflect that the applicant's response of August 19, 1969, to the Commission's letter of August 7, 1969 contained misrepresentations and was lacking in candor. The response was untrue insofar as it denied that Ira Brown made an appointment with Mr. A. L. Poppell to arrange for the sale of political time. It was also untrue in stating that Brown had not refused Poppell political time whereas in fact on the afternoon of July 6, 1969, Brown informed Poppell that his political announcements would not be broadcast. This refusal was also conveyed by Brown to an associate of Poppell by telephone on the evening of July 6. The August 19 response was lacking in candor in failing to reveal that Brown asked a representative of Poppell to sign a statement that Poppell and his associates would drop all charges lodged with the Commission. Brown, in responding on the licensee's behalf, stated only that he had requested that a receipt for the return of tapes to Poppell be signed. Evasiveness is evidenced by the comment made in response to a complaint of a threat of bodily harm to Barry Gross, that neither Brown nor anyone on his staff would exercise bodily force on anyone. This statement was made despite the fact that Brown had not even asked some of his employees if any such threat had been made. Another instance of evasiveness was the complete failure to respond to the charge that Brown had run several political announcements in his own voice on July 7, 1969, without any disclaimer and in rebuttal to Poppell's announcements.

2. The Commission, not satisfied with the applicant's first response, sent a second letter, dated September 24, 1969, asking a number of specific questions. This letter prompted the applicant's October 9, 1969 response which is also lacking in candor and contains misrepresentations. For one thing, the letter misrepresents the number and duration of political spots run on Brown's behalf over WPRY. Furthermore, the logs which Brown enclosed as proof of the spots run on his behalf did not reflect 11 of the 12 rebuttal spots broadcast on his

behalf on July 7, 1969. The letter is lacking in candor too when it states that Mr. Poppell received all advertisement he asked for when in fact the evidence shows that he sought more time and at an earlier date. The letter of October 9 contains a denial that any of Brown's spots were run near Poppell's. However, a stipulated account of Brown's spots shows that they ran either next to or close to each of Poppell's political announcements. The letter falsely claims that there was a one-minute musical interlude between Poppell's 60-second spot which began at 9:47 AM and Brown's only logged rebuttal, which began at 9:48 AM. The letter denies that Poppell's spots were tagged with political rebuttal whereas the record establishes that Brown's announcement was designed as rebuttal and was broadcast in close proximity to each of Poppell's spots. The letter falsely states that Brown did discuss the matter of the threat against Gross with the disc jockeys when in fact he had not done so. It also falsely claims that Brown's tax rebuttal announcement was logged, whereas in fact eleven out of 12 times this announcement was not logged. In addition, the letter is misleading in that only the signed statement of Brown, the program director and the chief engineer denying that they threatened Gross was submitted with it; however, a statement from three other employess was not included even though the licensee had been requested by the Commission to submit a statement from each of the station employees.

3. Brown was truthful in stating to the Commission on behalf of WPRY that there was no bodily harm threatened to Gross on or off the station's premises. The record reflects that a WPRY disc jockey, acting without the knowledge or authorization of Brown, made a telephone call on July 4, 1969 to Barry Gross, a representative of Mr. Poppell, in which a vague threat was uttered. Gross construed the remarks made to him as a threat of bodily harm if he should return to WPRY. However, there is no evidence of any language threatening "bodily harm" to Gross. It is noteworthy that Brown was not told about the incident. Moreover, the person making the threat apologized for his unwarranted remarks on the same day that he made them.

4. The Commission once more wrote to the licensee on December 24, 1969, asking for signed statements from additional employees concerning threats to Gross and also posing questions regarding political announcements broadcast on his behalf. This third Commission letter resulted in yet another response by the applicant on January 12, 1970, which contained evasive and false statements. Asked why he billed himself $120.00 for political spots apparently costing more, Brown failed to explain that he pro-rated the charge to himself for certain announcements even though there is no evidence that he had ever pro-rated a commercial for a WPRY customer. Once again, Brown falsely stated that he had not broadcast any spots in rebuttal to Poppell's announcements. Brown's statement that he was not aware that Messrs. Randall, Ellison and Stephens were employed at WPRY on July 4,

1969, is plausible inasmuch as he may not have recalled this fact. But even if he was not aware of this fact, such lack of awareness, in view of his access to employee records and logs, evince a cavalier attitude in responding to Commission inquiries that is tantamount to a lack of candor. The January 12 letter contained the further false statement that Brown had paid $120 for his spots whereas in fact he had drawn a check on the account of WPRY Radio, Inc. for that purpose. Finally, this letter was lacking in candor when it asserted that Brown would ask Randall, Ellison and Stephens "the same questions asked the other employees concerning threatening" Gross. In fact, no questions were asked of WPRY employees and Brown only sent statements of denial for the employees to sign.

5. Issue 2 requires the Examiner to determine from the evidence adduced at the hearing whether during the period July 2 through July 8, 1969, the applicant violated Section 315 of the Communications Act of 1934, as amended; Section 73.112 and 73.120(b), (c) or (d) of the Commission's Rules; or failed to fulfill the obligations imposed by the fairness doctrine. Section 73.112(a)(4)(ii) of the Commission's Rules provides that the following entry shall be made in the program log:

> "An entry for each announcement presenting a political candidate showing the name and affiliation of such candidate".

It is clear from the record evidence that WPRY violated the above-quoted rule by failing to record in the July 7, 1969 WPRY program log eleven of the twelve tax rebuttal announcements broadcast on Mr. Brown's behalf on that date.

6. Section 315 of the Communications Act of 1934, as amended, provides in pertinent parts as follows:

Sec. 315:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. * * *

It is concluded from the findings of fact herein that WPRY violated Section 315 of the Communications Act. The findings establish that Mr. Brown was on the air over WPRY for a total of 50 or 51 minutes on July 3, 1969. These 50 or 51 minutes were made up of Mr. Brown's appearances as an announcer reading commercial matters, sign-on and sign-off and introductions to news programs. These appearances by Brown over WPRY even in a non-political context constitute a "use" by Mr. Brown of WPRY under Section 315 (see *Letters to KUGN*, 40 FCC 293 (1958); *Robert Yeakel*, 40 FCC 282 (1957); *Kenneth E. Spengler*, 40 FCC 279 (1956); *Georgia Association of Broadcasters*, 40 FCC 343 (1962)). It is of no consequence that Mr. Brown was not

identified during any of these appearances over WPRY since uncontroverted testimony in the record establishes that his voice was well known in the community (see *In Re Station WBAX*, 17 FCC 2d 316 (1969)). Accordingly, Mr. Brown did, for 50 or 51 minutes on July 3, 1969, "use" WPRY free of charge. As a result, Mr. Poppell and all other candidates were entitled to receive comparable time at no cost (see "Equal Time Requirements", 40 FCC 251 (1962); Telegram to *WWIN*, 40 FCC 338 (1962)).

7. When representatives of Mr. Poppell, a legally qualified candidate, appeared at Station WPRY on July 4, 1969, to request 51 minutes of free time over WPRY on Poppell's behalf and Poppell was not thereafter afforded such time by the station, a violation of Section 315 of the Act occurred. Although there was subsequent partial compliance, when Poppell was accorded twelve minutes of free time on July 7, 1969, the violation was not cured since the requirement of law mandates comparable and equal time. Thus, when a request for comparable time is made four days before election day but is not honored until election day eve, and then only to the point of affording the requesting party less than one-fourth of the time asked for, the damage to the other candidate is irreparable and the purpose of Section 315 has been effectively thwarted. Finally, an additional factor weighs heavily against the licensee. Here one of the candidates was the part-owner and General Manager of WPRY, and he had taken advantage of these facilities to express his own candidacy. There is a special obligation on the part of licensees to insure fair dealings under the circumstances existing here (see letter to *Mr. Emerson Stone, Jr.*, 40 FCC 385 (1964)). Mr. Brown's action in this matter was not the kind of responsiveness and fairness which the Commission expects from its licensees under the requirements of Section 315. He made no attempt to notify his opponents of their right under Section 315 to free time flowing from his appearance on the air as a well-known station personality. When, in response to an inquiry he told the Commission on July 3, 1969, that he would offer Poppell comparable time, Brown made it impossible for Poppell to obtain such time on July 4, 1969, by being out of town and leaving no one at WPRY who was in a position to afford such time. Even after that, Brown evidenced no hurry to afford the comparable time despite the fact election day (July 8) was fast approaching. On July 6, 1969, he refused to broadcast announcements for Poppell, and on the morning of July 7 he sought a statement dropping charges against him for the return of tapes and when refused left the impression Poppell's announcements would not be aired. When he finally did give Poppell some free time on WPRY, it was 12 minutes on election eve and constituted substantially less time than required under Section 315. Even that instance of partial compliance with Section 315 of the Act was rendered less effective by Brown's next move, which was to rebut each of the Poppell announcements by his own announcements in close proximity to those of Poppell. It is concluded that such a per-

formance by a licensee does not meet the basic requirements of Section 315, or Commission policy.

8. Some additional discussion in connection with the Section 315 violation is required. Brown did not absent himself from the station and Perry on July 4, 1969, in order to avoid discussion with Poppell or his representatives on the matter of affording Poppell comparable time. His purpose in leaving the city was to visit at his brother's farm as he customarily did on July 4. However, he made no attempt to reach Poppell after returning home in the evening of July 4, at which time he was informed of the request for time made earlier that day on Poppell's behalf. It must be emphasized that Poppell's emissaries did not meet with an outright refusal of time on July 4. Instead they were truthfully told by the WPRY program director that he was not authorized to give Poppell free time, and that they would have to see Brown for this purpose. When Brown met with Poppell on the evening of July 5, 1969, at the WPRY studios, Brown offered to sell time to Poppell and did not undertake to afford free time. However, when Brown met with Poppell on the morning of July 6, he refused payment for Poppell announcements and informed Poppell he was entitled to free time. While the record shows that Brown agreed to broadcast announcements on Poppell's behalf the following day without charge, it is by no means clear from the evidence that Brown understood Poppell wished to have each of his three spots run every hour and indeed Poppell conceded that Brown could have been mistaken about Poppell's intentions as to the number of spots to be aired. It was not an attempt at censorship when Brown sought, at one point, to dissuade Poppell from airing the tax charge. But Brown's stated refusal both on the afternoon on July 6 and in the evening of that day because of the tax charge to be broadcast against him was an attempt at censorship, a practice prohibited by Section 315 of the Communications Act. However, Brown escaped being guilty of actual censorship by broadcasting the tax charge against himself without change. Brown's stated refusal at one time to broadcast Poppell's announcements because they were not entirely in the latter's voice was improper under Section 315 (see, *Letter to D. L. Grace, Esquire*, 40 FCC 297 (1958). Finally, there was no impropriety or illegality involved in the broadcast of rebuttal by Brown. It was only the placement of the rebuttal announcements which was objectionable. None of the foregoing comments alter the conclusion that Station WPRY violated Section 315 of the Act by failing to make comparable free time available to Mr. Poppell in the 1969 Perry Democratic primary election for the office of Mayor.

9. Section 73.120(b) of the Commission's Rules echoes Section 315 of the Act in requiring a station to afford equal opportunities to all legally qualified candidates for a public office in the use of such station. It is concluded that WPRY violated Section 73.120(b). The basis for this conclusion is explained in detail in paragraph 6, *supra*.

10. Section 73.120(c) of the Rules provides that the rates, if any, charged all candidates for the same office shall be uniform and shall

not be rebated by any means direct or indirect. It must be concluded that WPRY violated Section 73.120(c) by discriminating in the rates charged candidates for the Democratic nomination for Mayor of Perry, Florida, in 1969. Candidate Jackson was charged the full commerical rate for his political announcements. Candidate Brown was not charged that rate. Had Brown charged himself the full rate for his political announcements, he would have paid $157.10. Yet he only charged himself $120.00. Even if Brown's explanation that he pro-rated his own announcements is accepted,[17] he did not pay the full rate. It is in evidence that WPRY ran 136 political spots of various time lengths on Mr. Brown's behalf. Even if all those political spots were of the least inexpensive type offered by WPRY, i.e., 20 seconds for $1.00, WPRY would have had to charge Brown $136.00. It is clear from the evidence presented that all the spots run on Brown's behalf by WPRY were at least 20 seconds long. Fifty of Brown's spots were longer than 20 seconds. No amount of so-called "pro-rating" can conceal that WPRY charged Brown at a lesser rate than it did candidate Jackson. The fact that the money paid by candidate Jackson was subsequently refunded nine days prior to the start of the hearing in this case does not vitiate the violation. It is no defense to make a refund long after the violation of Section 73.120(c) was committed.

11. Further, with respect to Section 73.120(c), it is concluded that WPRY also violated that section by permitting Brown to pay nothing for his political announcements while charging candidate Jackson $42.00 and receiving payment thereof as is evidenced by the refund made to Jackson. This is to say that while Brown was charged too little ($120.00) for his political spots, WPRY also violated Section 73.120(c) by requiring Jackson to pay for his spots but not requiring actual payment by Brown. It is seen that the check drawn by Brown on WPRY's account in the amount of $120.00 ostensibly in payment of his obligation benefited WPRY in no real way. The station's account was debited $120.00 and was credited $120.00. Brown's claim that his actual payment of the $120.00 by him was to be accomplished by his cancellation of $120.00 worth of debt owed him by WPRY in the form of uncashed WPRY salary checks payable to him is belied by his admission that no such cancellation has taken place. Indeed, at the time Brown testified, he had not yet even then paid the $120.00 he owed WPRY. This non-payment constitutes a second violation of Section 73.120(c).

12. Section 73.120(d) of the Rules requires a licensee to keep and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. The record is silent relative to a possible violation of Sec-

[17] Brown conceded at the hearing that WPRY never pro-rated the price of any other announcements where the time contracted for was not entirely used.

tion 73.120(d) and, therefore, this issue is resolved in the applicant's favor.

13. While as discussed, *infra*, the record establishes that Brown utilized WPRY's facilities to serve his private political interests rather than the public interest, the record will not support a conclusion that WPRY violated the Commission's fairness doctrine.

14. Issue 3 presents the question whether during the time Ira W. Brown was a legally qualified candidate for Mayor of Perry, the applicant used the station's facilities for the private interest of one of its principals or to achieve a personal advantage for him, rather than to serve the public interest. It is concluded that the record in this proceeding contains ample evidence to warrant the conclusion that, while Ira Brown was a candidate for Mayor of Perry in the 1969 primary election, WPRY was used for his private interests and to achieve a personal advantage for Brown rather than to serve the public interest. Evidence of this private interest versus public interest conflict is found throughout the record. Moreover, the record demonstrates repeatedly that WPRY, by failing to comply with Section 315 of the Act, by failing to require Brown to pay for political announcements, and by attempting to censor political announcements, was used throughout Brown's candidacy as a tool to promote that candidacy rather than the public interest.

15. Under Issue 4 it must next be determined, in light of the conclusions reached above as to violations of the Communications Act and Commission Regulations as well as the use of WPRY facilities for the personal advantage of Mr. Ira Brown, whether the applicant possesses the requisite qualifications to remain a licensee of the Commission. It has been concluded that Station WPRY, in the period from about June 25 to July 8, 1969, when Ira Brown, a one-third owner, was the General Manager, committed various violations of Section 315 of the Communications Act and various Commission Regulations thereunder in connection with the Democratic primary election campaign in Perry, Florida. Mr. Brown, whose voice was well-known to station listeners as an announcer, was himself a candidate in the primary. The Section 315 and related violations were encompassed within a relatively short period of time and mainly within the closing days of the primary campaign. The application of Section 315 involves an area of interpretation of considerable difficulty insofar as affording equal opportunities to candidates is concerned. Brown chose to operate in this area without the benefit of expert counsel and his conduct and decisions were obviously the product of an uninformed judgment. Under prodding from the Commission in the form of telegraphic communications resulting from complaints, he did take steps to afford political time to a rival candidate who filed the complaints. The time which the rival received was considerably less than required under the circumstances but Brown's behavior indicates a desire on his part to comply with the Rules once he became aware what was required of the station under them.

16. It must be recognized too that some unusual factors were present in connection with the Section 315 demand made for equal time: first, that the complaining rival in the primary was being counselled and represented by an employee of another local radio station; and secondly, that the rival was seeking to broadcast a tax charge against Brown personally which the latter believed untrue.[18] Brown, having failed to persuade his rival to delete this charge, did broadcast the charge against himself over Station WPRY. He closely followed the rival's announcement with a rebuttal announcement of his own. But, aside from the placement time of the rebuttal, there was nothing improper about airing it and Brown understood from a phone conversation with a Commission official that he was entitled to make the rebuttal.

17. A most serious charge leveled against Station WPRY was that a representative of a rival candidate had been threatened with "bodily harm" by a WPRY employee. It was developed in the hearing, however, that an employee of the station without the knowledge or authorization of Brown, had uttered a vague threat and on the same day apologized for this action. There is absolutely no evidence of any threat of "bodily harm".

18. Brown has explained the failure on July 7, 1969 to log eleven of his twelve rebuttal announcements as having resulted from preoccupation with other matters and his failure to make up a start order. The fact that at least one such announcement was logged indicates there was no motive of concealment or deliberate omission in not logging the eleven other spots and the Examiner finds no reason to question the truthfulness of Brown's explanation.

19. Brown's conduct in failing to bill himself for the full amount of the charges for his political spots and in not paying for his spots is inexcusable. It is conceivable that Brown viewed the station's indebtedness to him for more than the total cost of his spots as justifying his action. However, the requirement of Section 73.120(c) of the Rules that all candidates be charged uniformly overrides intrastation accounts and dictates that the station scrupulously observe the injunction that there be no preference among candidates with regard to charges for political announcements.

20. Brown, it has been found, was untruthful, evasive and lacking in candor in replying to various Commission communications. These matters have been fully discussed in earlier conclusions. So far as concerns the Commission's inquiry about the threat of bodily harm to a Poppell representative, Brown, as is revealed by his correspondence with former employees and to the Commission, was convinced the charge was untrue, as in fact it was, and treated the matter too lightly as evidenced by untruthful statements he made. The testimony of Brown that he did not initially submit statements from former disc

[18] The announcements in question each charged Brown with failure to pay a local tax. Brown insisted to the rival candidate that the tax had in fact been paid.

jockeys because he did not later recollect they were still employed at WPRY on July 4 is, as the Examiner has previously observed, plausible. However, it was incumbent upon him to have checked station records to ascertain the truth and he can be faulted for this carelessness.

21. Brown made a number of untruthful statements in his responses to Commission inquiries. The record affords no excuse for these untruths. As stated by the Commission in *Babcom, Inc.*, FCC 71-846, released August 25, 1971, "We must place great reliance upon the integrity and truthfulness of our licensees, and we must therefore be assured that they will provide the utmost verity at all times." Yet the Examiner cannot conclude that the licensee in this proceeding is unqualified to remain so. As noted above, the Section 315 and related violations occurred within a limited period of time and within a specialized area of station operation which involved rules not easily interpreted. The licensee did not avail itself of expert advice in responding to the exigencies of the 1969 election campaign and in responding to lengthy and detailed Commission inquiries. The WPRY Station Manager was obviously not well versed in Section 315 problems and did make an effort to comply with applicable requirements when he was made aware of them. Nor, despite the improper attitude he manifested in responding to Commission inquiries, can it be said that he was generally uncooperative. The adverse record developed in the hearing touched no part of the ordinary day-to-day program service of the community and, aside from matters connected with, and growing out of the short 1969 primary campaign, did not reflect otherwise upon the licensee's qualifications. Based upon these considerations, the Examiner concludes that the licensee should be held qualified to continue to operate WPRY as a Commission licensee.

22. Having reached the conclusion just stated above, there is no question but that the licensee's handling of the 1969 primary campaign and subsequent dealings with the Commission relative thereto did not comport in various respects with the high standards of performance expected of a licensee. Thus the imposition of some appropriate sanction is indicated. The Examiner has concluded that a short-term renewal of the station's license for approximately one year only will serve to insure proper performance of responsibilities in the future and impress upon the licensee the seriousness of its violations.

23. The Commission in its designation order provided that if it is determined the hearing record does not warrant an order denying the WPRY renewal application, it shall also be determined whether the licensee has willfully or repeatedly violated Section 315 of the Communications Act or Sections 73.112 and 73.120(b), (c) or (d) of the Commission's Rules, and, if so, whether an Order of Forfeiture pursuant to Section 503(b) of the Act in the amount of $10,000 or some lesser amount, should be issued. It is concluded that the licensee did willfully violate the above-cited provisions of the Act and Rules with the exception of Rule 73.120(d). Moreover, these violations were committed while the station was being managed by a part-owner of the station who was himself a candidate for office. This increases the

gravity of the offenses and warrants a penalty which will bring home to the licensee still more forcibly the seriousness of the misconduct catalogued above. Accordingly, the Examiner has concluded that a forfeiture of $5,000 shall also be imposed on the licensee, taking into account the financial adversity recently experienced by the licensee as reflected by the record.

"In view of the foregoing, IT IS ORDERED, That unless an appeal to the Commission is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of WPRY Radio Broadcasters, Inc. for renewal of license of Radio Station WPRY, Perry, Florida, IS GRANTED, but only for a period of approximately one year, which is to expire on the first day of the first even month one year following the effective date thereof."

IT IS FURTHER ORDERED, That WPRY Radio Broadcasters, Inc. SHALL FORFEIT the sum of five thousand dollars ($5,000), the forfeiture to be paid within 30 days after this Initial Decision becomes final, by mailing to the Commission a check, or similar instrument, in the amount of five thousand dollars ($5,000), drawn payable to the Treasurer of the United States.

FEDERAL COMMUNICATIONS COMMISSION,
ISADORE A. HONIG, *Hearing Examiner.*